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EDITOR'S NOTE

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(11)

No. 86-986-CFX
Status: GRANTED

Title: Eric J. Schneidewind, et al., Petitioners
v.
ANR Pipeline Company and ANR Storage Company

Docketed:
December 12, 1986

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Caruso,Louis J., Keskey,Don L.

Counsel for respondent: Jones,John C., Heineman Jr.,Benjamin W., Lee,Rex E., Trienens,Howard J., Trienens,Howard J.

Entry	Date	Note	Proceedings and Orders
1	Dec 12 1986	G	Petition for writ of certiorari filed.
2	Jan 9 1987		Brief of respondents ANR Pipeline Co., et al. in opposition filed.
3	Jan 14 1987		DISTRIBUTED. February 20, 1987
4	Jan 14 1987		REDISTRIBUTED. February 20, 1987
5	Feb 23 1987		Petition GRANTED.
			**********
7	Mar 16 1987		Order extending time to file brief of petitioner on the merits until May 9, 1987.
8	Apr 8 1987		Joint appendix filed.
9	May 8 1987		Brief amicus curiae of Council of State Governments, et al. filed.
10	May 8 1987		Brief amicus curiae of Natl Assn. of Regulatory Commissioners filed.
11	May 9 1987		Brief of petitioners Eric J. Schneidewind, et al. filed.
13	May 28 1987		Record filed.
15	May 28 1987		Order extending time to file brief of respondent on the merits until July 11, 1987.
16	Jun 1 1987		Record filed.
17	Jul 8 1987		Brief amicus curiae of Legal Foundation of America filed.
18	Jul 11 1987		Brief amicus curiae of Interstate Natural Gas Assn. of America filed.
19	Jul 11 1987		Brief of respondents ANR Pipeline Co., et al. filed.
20	Jul 17 1987		CIRCULATED.
21	Aug 31 1987		SET FOR ARGUMENT. Monday, November 2, 1987. (1st case).
22	Oct 24 1987	X	Reply brief of petitioners Eric J. Schneidewind, et al. filed.
23	Nov 2 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86-986

Supreme Court, U.S.
FILED
DEC 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

October Term, 1986

MICHIGAN PUBLIC SERVICE COMMISSIONERS
Eric J. SCHNEIDEWIND, Edwyna G. ANDERSON
and Matthew E. McLOGAN,
Petitioners,

v

ANR PIPELINE COMPANY and ANR STORAGE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

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QUESTIONS PRESENTED

I

Whether a state statute regulating utility securities, including natural gas companies having major operations in Michigan (1909 P.A. 144, M.C.L. 460.301 *et seq.*, is preempted by the Natural Gas Act (15 U.S.C. 717 *et seq.*).

II

Whether the Michigan Public Utility Securities statute, 1909 P.A. 144, M.C.L. 460.301 *et seq.*, violates the Commerce Clause of the United States Constitution on the basis that it impermissibly burdens interstate commerce.

PARTIES

The parties before the United States Court of Appeals for the Sixth Circuit were:

ANR Pipeline Company and ANR Storage Company, plaintiff/appellants.

Michigan Public Service Commissioners (former Michigan Public Service Commission Chairman Eric J. Schneidewind, and Commissioners Edwyna G. Anderson and Matthew E. McLogan in their official capacities), defendant/appellees.

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No. _____

In The Supreme Court of the United States

October Term, 1986

MICHIGAN PUBLIC SERVICE COMMISSIONERS Eric J. SCHNEIDEWIND, Edwyna G. ANDERSON and Matthew E. MCLOGAN,
Petitioners,

v

ANR PIPELINE COMPANY and ANR STORAGE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Michigan Public Service Commissisoners ("MPSC or Michigan") petition that a writ of *certiorari* issue to review the September 15, 1986, judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The September 15, 1986, Court of Appeals decision is in *ANR Pipeline Co., et al.* v. *Eric J. Schneidewind, et al.*, ____ F.2d ____ (1986), Appendix A (A1-A21).

The August 22, 1985, order and opinion of the District Court is in *ANR Pipeline Co., et al.* v *Eric J. Schneidewind. et al.* (W.D. Mich.), 627 F. Supp. 923 (1985), Appendix B (B1-B24).

JURISDICTION

Jurisdiction in this court exists by *certiorari* pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Michigan law ruled unconstitutional by the Court of Appeals, but upheld by the District Court, is the Michigan Utility Securities Statute, 1909 P.A. 144, M.C.L. 460.301 *et seq.* (''Act 144''), Appendix C (C1-C5). Other relevant federal statutory provisions are set forth in Appendix D.

STATEMENT OF THE CASE

A. Statutory Background

This petition seeks review of the Court of Appeals' determination that Act 144 (C1-C5) is unconstitutional as applied to ANR Pipeline Company (''Pipeline'') and ANR Storage Company (''Storage''), based upon preemption and Commerce Clause grounds.

Federal statutes grant FERC authority to regulate the transportation and sale of natural gas in interstate commerce, but not to regulate natural gas company securities (§ 1(b), 15 U.S.C. 717(b), D1-3). Other relevant federal statutes (D3-10) uphold, at a minimum, concurrent *state* regulation of securities.

B. Proceedings Below

On April 25, 1984, Pipeline and Storage filed a complaint in the District Court, pursuant to 42 U.S.C. 1983, seeking a declaratory judgment that Act 144 was unconstitutional as applied to them, and that the MPSC therefore lacked jurisdiction over their securities. At the time, neither respondent had any application pending before the MPSC.

On August 22, 1985, the District Court, based upon an agreed-upon record (SR) including discovery pleadings and stipulated facts (SF), ruled that Act 144, as applied to Pipeline and Storage, was not preempted by federal law and did not violate the Commerce Clause as a burden on interstate commerce.

On September 15, 1986, the Court of Appeals reversed the District Court, holding that Act 144 was preempted by federal law and constituted an impermissible burden on interstate commerce. No rehearing motion has been filed in the Court of Appeals.

C. Facts Concerning Pipeline Company and Storage Company

Pipeline and Storage are wholly owned subsidiaries of American Natural Resources Company (ANR), a diversified holding company. The principal offices of all three companies are located in Detroit, Michigan. Pipeline is a predominant natural gas supplier to Michigan, and has more contact with Michigan in terms of facilities, operations, investment, sales and supply responsibilities than any other state.[1] Pipeline sup-

[1] Pipeline provides a major portion of Michigan's gas supply; over 50 percent of Pipeline's 1983 sales were in Michigan, approximately 45 percent in Wisconsin, and less than five percent in other states; Pipeline owns and operates 773 miles of gas transmission pipeline and associated equipment in Michigan, 195 miles of field and storage pipelines, among other facilities, and operates 15 gas storage fields in Michigan; Pipeline has more net investment in Michigan than any other single state. (SR, SF 5-10.)

plies the peak winter requirements of its customers in Michigan and Wisconsin from its Michigan-operated storage fields, some of which have been developed by invoking certification authority from the MPSC and condemnation proceedings in Michigan courts (SF 9, 12).

Storage, a separate corporation, does not engage in any interstate transportation or sale of gas, and has no FERC-approved transportation tariffs (SF 21).[2] Storage is a Michigan corporation and conducts solely a gas storage business with all of its facilities, operations, and investment in Michigan. Storage stores gas by displacement[3] for several unaffiliated out-of-state customers.[4]

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[2] Storage also has no physical or other connection with Pipeline's function of transporting or selling natural gas, nor does it store gas for Pipeline. (SF 21, SR)

[3] Storage accepts and relinquishes gas at a point in Michigan through an interconnection with Great Lakes Gas Transmission Company. Displacement is a pipeline practice in which equivalent volumes of gas are exchanged by the pipeline at a mutually convenient point on its own transmission system in lieu of the pipeline acutally physically transporting the storage gas to the ultimate customer. (SF 19-21.)

[4] Storage is therefore not a natural gas company as defined by § 2(6) of the NGA, 15 U.S.C. 717a(6), Appendix D-1, since it does not transport or sell gas, either intrastate or interstate.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS DECISION VIOLATES THE FEDERAL STATUTORY SCHEME AND CONGRESSIONAL INTENT RELATIVE TO BOTH SECURITIES AND NATURAL GAS REGULATION.

The Court of Appeals has severely misapplied this Court's decisions governing preemption and the Commerce Clause, and has also overridden and ignored the congressionally mandated relationship between state and federal regulation of securities, and natural gas.

In reversing the District Court below, the Court of Appeals ruled that Act 144 is *implicitly* preempted by federal regulatory laws. This finding rests on two illogical and contradictory grounds: 1) that because Congress failed, in an otherwise comprehensive regulatory scheme, to provide FERC with any express statutory power in the Natuaral Gas Act (NGA) to regulate the securities of natural gas companies, Congress thereby intended to forego any securities regulation in the area (A-11), and 2) that FERC itself, by regulation, had *implicitly* preempted state utility securities regulation by requiring that certain information concerning the method of financing of proposed construction be appended to pipeline company applications for certificates of convenience and necessity to undertake new construction projects (A12–A16).

The Court of Appeals' erroneous conclusions regarding *implicit* preemption do great violence to congressional intent and this court's decisions. The apparent source of the lower court's error is the acceptance of respondents' thesis that *both* Pipeline and Storage are "natural gas companies" regulated by FERC and, therefore, they thereby obtain a special status exempting them from state laws governing other areas,

despite their extensive contacts with Michigan, or, alternatively, that this case involves attempted state regulation of interstate gas transportation or sales.

Neither of the Court of Appeals' premises are correct — Congress in the federal statutory scheme governing securities and natural gas did not intend companies having predominant operations in a state to be exempt from applicable state laws merely because they may be a "natural gas company" under the NGA. Further, this case does not represent an attempt by Michigan to regulate an area where FERC is regulating; namely, the interstate transportation or sale of gas as defined in § 1(b), 15 U.S.C. 717(b). Rather, this case involves the separate matter of *securities* regulation and, more specifically, the securities of companies heavily engaged in business in Michigan.

The Court of Appeals has erroneously overridden a congressionally mandated scheme of federal law that provides for either concurrent state/federal jurisdiction over the regulation of securities, or the delegation of the same to the states. For example, the federal Securities Act of 1933, which established securities regulation under the Securities Exchange Commission (SEC), *preserves* state jurisdiction over securities (§ 18, 15 U.S.C. 77r, D3–4). Similarly, the federal Public Utility Holding Company Act (PUHCA), 15 U.S.C. 79 *et seq.*, which requires the approval of the SEC before a utility holding company or its subsidiary company issues or sells securities, specifically preserves state commission regulatory authority over the securities of companies subject to PUHCA, and reinforces the congressional intent that federal securities regulation not impinge upon state securities regulation (PUHCA §§ 7g(g), 10j(f), 20t(b), 21; D4–7). Further, the Federal Power Act, 16 U.S.C. 79a *et seq.*, provides FERC with authority to regulate securities *only* where state utility securities regulation does not exist, and expressly bars FERC

securities jurisdiction when a state exercises securities jurisdiction (Federal Power Act, §§ 19, 20, 204, 308; D7–10).

In the NGA Congress did not expressly grant FERC any regulatory jurisdiction over the securities of natural gas companies. Moreover, the legislative history indicates that the exclusion of specific authority to FERC to regulate securities of natural gas companies was intentional, and not an oversight. The treatise, 1 Loss, "Securities Regulation", (2d Ed.), p. 426, states:

> "Bills recommended by the [Federal Power] Commission to regulate the issuance of securities by 'natural gas companies' (as well as other persons seeking funds for the construction, acquisition or operation of any facility for which a certificate of public convenience and necessity is required under the Natural Gas Act) were introduced in 1949 and 1955, but were not reported out of committee (legislative history footnotes omitted)."

It is disingenuous for the Court of Appeals to hold that Congress by the NGA, or FERC by regulation, has *implicitly* preempted state regulation of natural gas company securities when the applicable federal statutes are silent as to the grant of any securities jurisdiction in FERC, and when Congress in the 1933 Securities Act, PUHCA, and the Federal Power Act has specifically preserved state utility securities jurisdiction.

Besides violating the federal statutory scheme which preserves state securities regulation, the Court of Appeals has overridden congressional intent in another major way — by failing to recognize the overall purpose and intent of the federal acts governing natural gas regulation. Unlike the District Court, the Court of Appeals ignored the fact that Congress passed the NGA with the intent to complement and

supplement, not supplant, state utility regulation.[5] As this court held in *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm. of Indiana*, 332 U.S. 507, 519-520 (1947), the congressional purpose in passing the NGA was to fill "regulatory gaps," not create them, and to bring about more effective state regulation and in no manner to usurp state authority. See also *Federal Power Comm.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 5 L.Ed.2d 377, 389 (1961). Yet here, the Court of Appeals, contrary to the purpose of the NGA, has cited the NGA as having a preemptive purpose, and has created a regulatory gap in an area (utility securities) in which state authority has practicably regulated since the early part of this century.

The Court of Appeals' failure to recognize the federal statutory scheme concerning both securities and natural gas regulation is fatal to the court's preemption analysis. This congressionally established state and federal regulatory relationship greatly minimizes any preemptive effect of federal regulation with respect to areas of regulation traditionally handled by the states, and outright eliminates the application of preemption in this case.

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[5] The NGA, 15 U.S.C. 717 *et seq.*, was enacted in June, 1938. It was because of abuses of natural gas companies and the inability of the states to regulate sales for resale, the so-called ~~wholesale~~ sales in interstate commerce, due to earlier court decisions, see *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298 (1924), *Public Service Comm.* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), that Congress was petitioned by the states to fill the regulatory gap.

II

THE COURT OF APPEALS' RULING IS CONTRARY TO THE DECISIONS OF THIS COURT.

A. THE COURT OF APPEALS MISAPPLIED THIS COURT'S PREEMPTION DECISIONS.

The Court of Appeals' failure to recognize congressional intent with respect to the relationship of state and federal law involving the regulation of securities and natural gas was further compounded when it misapplied the preemption principles established by this court. In *Louisiana Public Service Comm.* v. *FCC*, 476 U.S. ____; 90 L.Ed.2d 369, 381-382 (1986), in another dispute involving state and federal regulatory relationships, this Court summarized the tests for preemption (90 L.Ed. 369, 381-382) and noted:

> "The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law."

In *Louisiana*, the FCC argued that it could preempt state action by agency regulation except when the matter to be regulated was purely local and when interstate communication was not affected. In response, this Court stated:

> "The short answer to this argument is that it misrepresents the statutory scheme and the basis and test for preemption. While it is certainly true, and a basic underpinning of our federal system, that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, *Hines*, 312 US, at 67, 85 L Ed 581, 61 S Ct 399, it is also true that a federal agency may pre-empt state law only when and if it is acting within the

> scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign state, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency."
> 90 L.Ed.2d 369, 385 (Italics supplied)

Applying the preemption tests summarized in *Louisiana* (90 L.Ed. 369, 381-382), it is clear that no finding of preemption is appropriate in this case. As noted, Congress in the NGA and other federal statutes did not express any intent to preempt state law with respect to securities regulation. Nor did either court below find there was an outright or actual conflict between federal and state law, or that compliance with both federal and state law was "physically impossible."

A valid finding of preemption similarly is not possible under the remaining tests summarized in *Louisiana*; namely, that there is implicit in federal law a barrier to state regulation; that Congress had legislated comprehensively, occupying an entire field of regulation, leaving no room for states to supplement federal law; or that state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. The Court of Apeals' finding that Congress, by its failure to grant FERC securities jurisdiction, thereby intended to "deregulate" securities regulation with respect to natural gas companies, simply defies logic. As noted, Congress has neither occupied the entire field of securities regulation or natural gas regulation nor has it precluded the states from such traditional areas of regulation. Instead, the reverse is true — Congress has preserved state securities regulation. Moreover, Congress' intent under the NGA is not preemptive

in nature, but is aimed at complementing and strengthening existing state regulation.

Rather than abide by this Court's decisions, the Court of Appeals found *implicit* preemption here based upon an erroneous analysis of the purpose of the NGA and of FERC agency action under such circumstances. The Court of Appeals cited this court's decision in *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Board*, 88 L.Ed.2d 732; 106 S. Ct. 709, 716 (1986), for the proposition that since the NGA and NGPA contemplate a comprehensive gas policy, and neither contain an advance approval form of utility securities regulation, that Congress may have intended the area to go unregulated, thereby implicitly preempting the states (A-11). The Court of Appeals' error in reasoning, which would apply to all securities statutes (whether of the advance approval type or otherwise), goes back to its original mistaken premise; i.e., that this case involves state regulation of interstate natural gas transportation or sales as the situation in *Transcontinental*. Clearly, this case does not and the *Transcontinental* decision is simply not applicable. Rather, this case involves a separate complementary area of securities regulation that Congress has expressly permitted the states to retain, and which Congress has seen fit to *exclude* from FERC's powers as indicated by Congress' rejection in 1949 and 1955 of bills providing for FERC securities jurisdiction (see page 7, *supra*). Congress no doubt excluded securities regulation from the NGA description of FERC's expressed powers and jurisdiction in line with the overall purpose of the NGA to complement, not supplant, state power, in recognition of the fact that the states have long regulated utility securities.

The Court of Appeals also cites language from *Federal Power Comm.* v. *Hunt*, 376 U.S. 515, 11 L.Ed.2d 878, 885 (1964) as indicating that § 7(c) and (e) of the NGA, 15 U.S.C. 717f(c) and (e)(D2-3), were enacted as amendments to give FERC

the opportunity to scrutinize the "financial set-up" in conjunction with applications for certificates of convenience and necessity for new construction. However, the *Hunt* decision does not hold that certificate review constitutes securities regulation. Indeed, the later legislative history in 1949 and 1955 suggests that Congress specifically rejected granting FERC expressed authority to undertake securities jurisdiction. Further, the oblique language in *Hunt* cannot serve to incorporate language in § 7(c) and (e) that is not there. The logical conclusion is that Congress neither granted FERC authority to engage in securities regulation, nor did Congress intend to preempt long-established regulation of utility securities by the states.

The alternative theory advanced by the Court of Appeals is likewise without merit, namely, that FERC regulations had *implicitly* preempted state utility securities by requiring "natural gas companies" to submit detailed financing plans as part of the application process for a "certificate of public convenience and necessity," and that under the Supremacy Clause the state regulation is invalidated to the degree it conflicts with the federal regulation (A12–A16). This is the FCC's *Louisiana* argument all over again. The short answer to this, as stated by this Court in *Louisiana*, *supra*, is that "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign state, unless and until Congress confers power upon it." In this case, Congress has not granted FERC authority to engage in securities regulation, nor to preempt state securities regulation. Thus, like the *Louisiana* situation, a FERC regulation purporting to grant the agency such power would be a nullity, and beyond the scope of authority granted by Congress.

Equally important, however, the FERC regulations cited by the Court of Appeals simply do not equate to securities regulation, but rather, require the filing of the financial information to permit FERC an opportunity to better evaluate the

certificate proposal. Nor are there any facts or FERC agency decisions cited to support the view that FERC interprets the cited regulations to constitute securities regulation, let alone an agency policy to preempt state securities regulation. Clearly, the regulations do not provide for formal review or approval of specific securities. Furthermore, the FERC regulations referenced by the court (A14, para. xii) establish FERC's own view that other regulatory bodies, such as the Securities and Exchange Commission, have the ultimate authority to regulate the securities associated with any project that is the subject of a certificate application (and the Securities Act preserves state securities jurisdiction, as noted).

The FERC regulations cited by the Court of Appeals do not constitute FERC securities regulation for another very practical reason — that FERC reviews of applications for certificates of convenience and necessity have historically taken notoriously long to complete, sometimes many years. This situation is referenced throughout the *Hunt* case cited by the Court of Appeals (11 L.Ed.2d 878, 882, 886), and has continued up to modern times.[6] The suggestion that stale securities information appended to certificate applications constitutes securities regulation is incredible. The bottom line is that even if FERC were expressly authorized in the NGA to engage in securities regulation over natural gas companies (which it is not), FERC is *not* undertaking such regulation.

Finally, the Court of Appeals erroneously suggests that even if Congress has not implicitly displaced state regulation

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[6] For example, respondents have been involved in a certificate proceeding at FERC concerning competing construction proposals to transport natural gas to the northeastern states, *In the matter of Boundary Gas, Inc., et al.*, FERC Docket No. CP81-107 *et al.* The original application in that case has been pending since December 19, 1980, and no end to the case is in sight.

in the natural gas industry, the Supremacy Clause invalidates state regulation to the extent it conflicts with federal regulation and that the state regulation in this case presents the "possibility of conflict" between federal and state regulation (A16). The Court of Appeals reached this erroneous conclusion by inventing a hypothetical conflict in which the pipeline company was proposing to issue securities for a national construction project authorized by FERC and Michigan failed to authorize the issuance of the securities. At best, the Court of Appeals' skewed hypothetical situation is highly improbable since Act 144 seeks to prevent the issuance of long-term securities for unlawful purposes and to prevent overcapitalization (such as the abusive leveraging of utility assets) which situations are unlikely to occur with respect to the construction of new facilities, particularly facilities approved by FERC.[7] Further, the Michigan Supreme Court has interpreted the MPSC inquiry in construction situations to be limited under Act 144 to primarily a determination as to the lawfulness of the securities and not being related to the underlying need for the project being constructed. *Attorney General* v. *Michigan Public Service Comm.*, 412 Mich. 385; 316 N.W.2d 187, 190 (1982). This state law interpretation reinforces the extreme unlikelihood of any conflict occurring between FERC certificate and MPSC securities authority with respect to respondents, and also suggests, contrary to the Court of Appeals' assumption, that overcapitalization abuses are viewed as being less likely to occur in situations where securities are issued for bona fide construction projects. Moreover, it is Michigan's policy to administer Act 144 in a manner which does not conflict with

[7] In construction situations, FERC will have certified the project as to need, and new securities will be backed by the additonal useful assets represented by the construction. In all other potential situations, however, FERC engages in no review whatsoever, the securities may not be backed by additional assets, and the function of state securities regulation takes on added importance.

lawful FERC decisions; and, in actual practice, Michigan's securities reviews are completed much faster than FERC's decisions on certificates for new construction, as noted.

The Court of Appeals' imaginary conflict also does not support preemption because nothing in the evidentiary record suggests either an actual or possible conflict, as Act 144 has been interpreted and administered. Rather, the record establishes a long and uninterrupted history of successful joint compliance with the NGA, the 1933 federal Securities Act, and Act 144 since its enactment in 1909, and Pipeline's and Storage's formation in 1945 and 1978, respectively. As the District Court noted (B15):

> "...the 'potential disruption' of which plaintiffs complain is purely hypothetical. Plaintiffs fear but can point to no instance where a security issuance presented to defendants prevented a FERC certified project from going forward. In fact, plaintiffs can point to no instance of actual disruption of FERC authority under the NGA by virtue of any of defendants' assertion of jurisdiction under Act 144."

Even if preemption could be based upon theoretical situations, the Court of Appeals' application of preemption is far broader than the hypothetical. Act 144 applies to the issuance of securities for a number of purposes besides construction, including those which do not require the filing of information at FERC, such as refinancings, borrowing against assets, etc. In all of these situations, potential abuses can occur, yet the lower court's ruling deregulates any review of the transaction.

In addition to the *Louisiana* case, wherein this Court recently held that neither implicit preemption nor Supremacy Clause arguments can prevail in the face of express congressional intent that the states retain regulatory power in an area, the Court of Appeals' preemption analysis also appears inconsistent with the major tenor of this court's recent decisions

which have refused to find preemption where no actual conflict exists and where a matter of traditional state authority is involved.[8]

The Court of Appeals' preemption analysis is contrary to federal statutory provisions, congressional intent, and this court's preemption decisions. Congress did not intend to alternatively deregulate, or implicitly preempt, state utility securities regulation, nor have FERC regulations implicitly preempted state securities jurisdiction.

B. THE COURT OF APPEALS HAS MISAPPLIED THIS COURT'S DECISIONS IN FINDING MICHIGAN' ACT 144 UNCONSTITUTIONAL AS A BURDEN ON INTERSTATE COMMERCE.

The Court of Appeals (A17–A18), citing *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, ____ L.Ed.2d ____; 106 S. Ct. 1080 (1986), determined that Act 144 was *per se* invalid as a burden on interstate commerce because:

> "...a requirement that plaintiffs-appellants obtain 'advance approval' from MPSC before issuing securities, the proceeds of which may be used to finance a project in another State, directly regulates interstate commerce. Consequently, we hold that Act 144 directly burdens interstate commerce." (A18).

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[8] In *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm.*, 461 U.S. 375; 76 L.Ed.2d 1 (May, 1983) (state regulatory commission could set cooperative association's wholesale rates, over which FERC had general authority, because FERC was not actually regulating the rates); see also *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm.*, 461 U.S. 190; 75 L.Ed.2d 752 (1983); *Wardair Canada, Inc* v *Florida Department of Revenue*, 477 US ____, 91 L.Ed.2d 1 (1986).

The *Brown-Forman Distillers* test for *per se invalidity* under the Commerce Clause states:

> "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry."

The Court of Appeals' conclusions concerning the *per se* invalidity of Act 144 is tainted by its sole reliance on imaginary facts, which are left unstated. No evidence or other basis exists to support the view that Act 144 "regulates or discriminates" against interstate commerce or that its effect is "to favor in-state economic interests over out-of-state interests."

This Court, in reviewing state action involving utility regulation, has long refused to either preempt state law or to find Commerce Clause violations based upon hypothetical situations or imaginary facts. *Panhandle Eastern Pipe Line* v. *Public Service Comm. of Indiana*, 332 US 507, 523–524. In *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm.*, 461 U.S. 375; 76 L.Ed.2d 1, 18 (1983), this court rejected reliance on such situations in facial challenges to state regulation:

> "...as we said in our discussion of the preemption issue [cite omitted], we are not willing to allow such a hypothetical possibility to control this facial challenge to the PSC's mere assertion of regulatory jurisdiction [cite omitted]." 76 L.Ed.2d 18

The evidence in this case, and the thorough findings of the District Court (B16–24), left uncontradicted by the Court of Appeals, establish that Act 144 is evenhanded, does not discriminate against interstate commerce, and has not been established or enforced to benefit local commerce over interstate commerce. Secondly, contrary to the Court of Appeals' conclusion, Act 144 does not directly regulate interstate commerce,

such as attempting to affect interstate competitive markets or prices, in the manner resembling the *Brown-Forman Distillers* situation. No purpose of economic protectionism underlie Act 144. Rather, Act 144 represents an exercise of the state police power over Pipeline's and Storage's securities to protect the public from the effects of securities issuances which may be unlawful or which may result in abusive overcapitalization situations. This state police power has been specifically upheld by Congress and its exercise has only an incidental effect upon interstate commerce. The overly sweeping scope of the Court of Appeals' conclusion regarding the *per se* invalidity of Act 144 constitutes in reality a finding that *any* state regulation of a business engaging in interstate commerce "directly regulates" interstate commerce. This is contrary to rulings of this Court,[9] and particularly the reasoning in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142; 25 L.Ed.2d 174 (1970), discussed *infra*.

The Court of Appeals also failed to conduct any legitimate analysis under the *Bruce Church* "balancing test" (referenced at A18) in determining that Act 144 violated the Commerce Clause, but rather, simply rejected the District Court's well-reasoned balancing analysis. For instance, at a key juncture, the Court of Appeals, without any supporting facts or reasoning, simply states (A19):

> "...An analysis of the alleged benefits reveals that they do not further important state interests. The problem of over-capitalization is largely related to the construction,

[9] This court has held that the Commerce Clause, in conferring upon Congress power to regulate commerce, did not wholly withhold from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, even though the regulation affects interstate commerce. *California* v. *Thompson*, 313 U.S. 109; 85 L.Ed. 1219 (1941), *Southern Pacific Co.* v. *Arizona ex rel Sullivan, Attorney General*, 325 U.S. 761; 89 L.Ed. 1915 (1945), *Huron-Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440; 4 L.Ed.2d 852; (1960).

> expansion, and acquisition of natural gas facilities. FERC, however, exercises sufficient control over such decisions by issuing 'certificates of public convenience and necessity.' ...FERC also regulates the rates that 'natural-gas companies' can charge..."

The Court of Appeals' one-sentence statement simply concludes, despite the District Court's thorough analysis of the local benefits involved, that important state benefits are not involved. No explanation is provided. Then the Court of Appeals proceeds to its unsupportable finding that overcapitalization is largely related to the "construction, expansion, and acquisition of natural gas facilities," which are sufficiently regulated by FERC. No record basis exists, however, to support this assumption, and it is patently incorrect, as noted. The Court of Appeals' findings thus constitute nothing more than non-record imaginary assumptions.

The Court of Appeals' bare-bones analysis not only is deficient in assuming that securities are issued only for construction purposes, but also because it treats Pipeline and Storage the same. Clearly, they are not. While Pipeline is an interstate pipeline that may have certificated construction projects in other states (which are not adversely affected by Act 144), Storage is not. Rather, the facts establish that Storage is à Michigan corporation having no connection with Pipeline's interstate transportation or sales business, which is conducting a gas storage business wholly within Michigan. Its only contact with interstate commerce is that it has chosen to serve out-of-state customers. The Court of Appeals' analysis thus holds that a business wholly located within Michigan cannot be regulated pursuant to the state's police powers because it sells services to out-of-state customers, which conclusion misconstrues Commerce Clause analysis.

The Court of Appeals also erroneously suggests that FERC's regulation of respondents' rates is a factor to be considered. But the existence of FERC's ratemaking power does

not mean that the separable and important tool of securities regulation must be voided, or that it cannot coexist with securities regulation to protect the public interest. FERC regulation of the rates of natural gas companies, which involves largely an "after-the-fact" review of the decisions of utilities, does not itself justify the conclusion that state securities regulation providing for preissuance (or postissuance) review of utility financing is unconstitutional.

Unlike the Court of Appeals, the District Court fully implemented the *Bruce Church* balancing test. In evaluating the local public interest served by the securities regulation, the District Court reviewed the purpose of Act 144 and the manner in which it protected the public from the potential perils resulting from overcapitalization (B17-19, 23). On the other hand, the District Court found the burdens to be very limited or nonexistent, finding that the state regulation was reasonably tailored and evenhanded, was expeditious, and resulted in no disruptions or delays, among similar findings (B20-21, 23-24).[10]

In view of the District Court's thorough record-based findings, the Court of Appeals' parting conclusion that Michigan's securities regulation, as applied to Pipeline and Storage, involves "burdens of expense, delay, and administrative hassle" are wholly unfounded. Rather than constitute a viable Commerce Clause analysis, the court's improper conclusions merely reveal a judicial bias in favor of total deregulation of respondents' securities.

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[10] The Court of Appeals (A19, footnote 8) is in error when it suggests that petitionerss are contradictory in citing the flexibility and expeditious nature of Act 144, while also citing its importance in protecting the public interest. These are not contradictory in any manner, since Act 144 can be administered swiftly with respect to financings which are legitimate and lawful. This does not diminish the importance of Act 144 as a tool to deter the hopefully infrequent situation in which a proposed financing is either unlawful or would result in an overcapitalization situation.

The other state cases cited by the Court of Appeals (A19) which have held that state regulation requiring advance approval of securities for companies engaged in interstate commerce are unconstitutionally burdensome mainly involve situations in which the states had only minimal, at best, contacts with respect to the companies involved, or are otherwise factually distinguishable. Further, *Natural Gas Pipeline Co.* v. *Illinois Commerce Comm.*, 33 Ill.2d 214; 210 N.E.2d 490 (1965), cited at A14, did not involve such predominant contacts between the company and Illinois as exist between respondents and Michigan. Also, *Natural Gas Pipeline* did not consider the issues here, and may have been wrongly decided.

In summary, the District Court's record-based findings that both Pipeline and Storage have substantial contacts with Michigan and that Act 144 provides benefits that outweigh any minimal or incidental burden to intersstate commerce are clearly correct. The Court of Appeals' contrary conclusions, based upon imaginary facts, are wholly erroneous.

III

THE ISSUES PRESENTED ARE IMPORTANT TO MICHIGAN UTILITY SECURITIES REGULATION AND HAVE NATIONAL IMPACT.

This case has significant importance to Michigan because the Court of Appeals has ruled unconstitutional the application of Act 144, according to its terms, to Respondents Pipeline and Storage, which are companies having predominant contacts and operations in Michigan. Act 144 is a long-held exercise of the state's police powers which has been recently upheld by two Michigan Supreme Court cases in which the Act was challenged based upon the same preemption and Commerce Clause claims as here, under very similar facts.

Michigan Gas Storage Co. v. *MPSC*, 405 Mich. 376; 275 N.W.2d 457 (1979), and *Indiana & Michigan Power Co.* v. *MPSC*, 405 Mich. 400; 275 N.W.2d 450 (1979). The Court of Appeals, in reversing the District Court below and the reasoning of the Michigan Supreme Court in the above two cases, has thus created a conflict in authority with respect to the proper relationship between state and federal law involving securities regulation.

The Court of Appeals decision also potentially limits similar securities statutes throughout the nation, suggesting the need for guidance concerning the relationship of state and federal regulation in this area. State utility securities regulation is pervasive, inasmuch as 41 other states have some form of such regulation.[11]

Further, the instant controversy is ripe for resolution. In determining the course of the state and federal relationship over utility securities, this case presents a prime situation for upholding reasonably tailored state regulation as applied to companies having heavy contacts with the state and where impacts on interstate commerce are incidental. In other words, if Act 144 is unconstitutional as applied to respondents herein under these facts, then it is difficult to imagine how any state utility securities act could be constitutional whenever it is applied to any company which can claim contact with interstate commerce or with some aspect of federal regulation.

Finally, only review by this court can prevent the judicial deregulation of securities, not only with respect to repondents

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[11] 1984 Annual Report of National Association of Regulatory Utility Commissioners (NARUC), pp. 521-525. The same NARUC report (p. 522, 524, footnote 2) states that FERC has no securities jurisdiction over gas utilities and that FERC jurisdiction over issuances of securities by electric utilities is limited to companies organized and operating in states where their securities are not regulated by the state, referencing Section 204 of the Federal Power Act. (Section 204 is found at D-9).

but with respect to similar situations nationwide, which the Court of Appeals has undertaken in this case. This deregulation will now occur because FERC actually does not regulate the securities of either Pipeline or Storage, and now, pursuant to the Court of Appeals decision, neither will the MPSC. This deregulation also leaves Michigan and the public generally without any protection from potential self-serving overcapitalization actions by respondents.

CONCLUSION

Michigan's Act 144 regulating the securities of utilities, including respondents', is not preempted by federal law since federal securities statutes and the Natural Gas Act express no congressional intent to preempt such state regulation, but rather, indicate congressional intent not to preempt state law. Further, FERC does not engage in securities regulation with respect to these companies, and the state regulation pursuant to the state's police powers is undertaken in a manner which is harmonious with the Natural Gas Act and the national interest. Further, the companies here have particularly strong state connections, and engage in conduct greatly influencing the rights and well being of local natural gas distribution companies and the state citizenry.

Michigan's Act 144 also does not violate the Commerce Clause because it applies evenhandedly, does not discriminate against interstate commerce, and involves the regulation of important local interests pursuant to the state's long-held police powers. No issue of economic protectionism is presented, and the record establishes that any burden on interstate commerce is nonexistence or incidental. Any suggestions of a burden on interstate commerce consist of imaginary hypothetical situations, which have not occurred in the 87-year history of the Act, and which assume erroneous interpretation of the state Act and arbitrary state action.

RELIEF SOUGHT

For the above reasons, petitioners respectfully request that a writ of *certiorari* be issued to review the September 15, 1986, decision of the United States Court of Appeals for the Sixth Circuit. In the event *certiorari* is granted, Michigan respectfully suggests that *amicus curiae* participation by the Federal Energy Regulatory Commission be considered if deemed appropriate by the Court.

Respectfully submitted,

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DATED: December 12, 1986

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RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 85-1762

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANR Pipeline Company and ANR Storage Company,
Plaintiffs-Appellants,

v.

Eric J. Schneidewind, Matthew E. McLogan and Edwyna G. Anderson,
Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Michigan

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Decided and Filed September 15, 1986

Before: KENNEDY and BOGGS, Circuit Judges; and BROWN, Senior Circuit Judge.

KENNEDY, Circuit Judge. This appeal presents two questions: (1) Whether the Natural Gas Act ("NGA"), codified at 15 U.S.C. §§ 717-717w, preempts the Michigan public utilities securities regulation law, 1909 Mich. Pub. Acts No. 144 ("Act 144"), codified at Mich. Comp. Laws § 460.301,[1] which requires public utilities, including "natural-gas companies"

(Text continued on page A-3)

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[1] Mich. Comp. Laws § 460.301 provides in pertinent part:

(1) A ... corporation, association, or individual exercising or claiming the right to carry or transport natural gas for public use, directly or indirectly ... or engaged in the business of piping or transporting natural gas for public use, directly or indirectly, or

engaged in the business of purchasing natural gas for distribution may issue stocks, bonds, notes, or other evidences of indebtedness payable at periods of more than 12 months after the date of issuance, if necessary for the acquisition of property, the construction, completion, extension, or improvement of facilities or for the improvement or maintenance of service or for the discharge or lawful refunding of obligations and may issue stock to represent accumulated earnings invested in capital assets and not previously capitalized, if the Michigan public service commission issues an order authorizing the issue and the amount of the issue, and states that in the opinion of the commission the use of the capital or property to be acquired to be secured by the issue of the stock, bonds, notes, or other evidences of indebtedness, is reasonably required for the purposes of the person, corporation, or association, or that the issue of the stock fairly represents accumulated and undistributed earnings invested in capital assets and not previously capitalized. . . .

(2) A person, corporation, or association desiring authority to issue stocks, bonds, notes, or other evidences of indebtedness shall make written application to the commission in the form as the commission requires. After receiving the application, the commission, for the purpose of determining whether the commission should grant the authority, may make an inquiry or investigation, hold hearings, and examine witnesses, books, papers, documents, or contracts the commission considers of importance in enabling it to reach a determination. An interested person, including municipalities and organizations whose membership consists of a substantial number of ratepayers within the service area of the utility, shall have the right to intervene as provided in the rules of the commission. If the applicant fails, neglects, or refuses to furnish the information required by the commission, or if the commission directs, an appraisal of the property of the applicant shall be made by a disinterested person to be appointed by the commission and whose compensation shall be fixed by the commission. The entire expense of making the appraisal shall be borne by the applicant. After the appraisal is made and filed with the commission and before any action is taken by the commission upon the application, the expenses of the appraisal as determined by the commission shall be paid by the applicant to the commission, which shall deposit the amount in the treasury of the state to be credited to the general fund, taking the receipt of the treasurer for the deposit and filing the receipt in the commission's office with the

as defined under the NGA in 15 U.S.C. § 717a(6), operating in Michigan to obtain the approval of the Michigan Public Service Commission ("MPSC") before issuing long-term[2]

application. If the applicant refuses or neglects to pay the expense of the appraisal, the commission shall dismiss the application and the commission may bring an action against the applicant in a court of competent jurisdiction in this state for the recovery of the expense of the appraisal. The expense of the appraisal shall be paid by the state treasurer to the person certified by the commission to be entitled to the appraisal fee.

(3) If from the application filed and other information obtained from the investigation authorized in this act the commission is satisfied that the funds derived from the issue of stocks, bonds, or notes are to be applied to lawful purposes and that the issue and amount is essential to the successful carrying out of the purposes, or that the issue of the stock fairly represents accumulated and undistributed earnings invested in capital assets and not previously capitalized, the commission shall grant authority to make the issue. In granting the authority, the commission may impose as a condition of the grant reasonable terms and conditions that the commission considers proper.

(4) A person, corporation, or association may issue notes for lawful purposes, payable at periods of not more than 24 months, without authority from the commission; but the notes shall not in whole or in part, be refunded by an issue of stock or bonds or by an evidence of indebtedness running for more than 12 months without the consent of the commission.

. . . .

(8) This act shall not apply to a person, corporation, or association which is engaged in the business of carrying, transporting, piping, purchasing for distribution, or selling natural gas into this state, which derives less than 5% of its consolidated gross revenues from all of its operations from natural gas operations in this state, and which does not offer residential natural gas service to the general public under rules promulgated by the Michigan public service commission.

[2] The statute contains an exception that generally allows utilities to issue notes payable over periods not exceeding two years without obtaining MPSC's approval. Mich. Comp. Laws § 460.301(4).

securities; and (2) Whether Act 144 violates the Commerce Clause of the United States Constitution. The United States District Court for the Western District of Michigan held that federal law did not preempt Act 144 and that Act 144 did not violate the Commerce Clause. For the reasons stated below, we hold that the NGA implicitly preempts Act 144. In addition, we hold that Act 144 unconstitutionally burdens interstate commerce. Accordingly, we reverse the judgment of the District Court.

Plaintiffs-appellants, ANR Pipeline Company ("Pipeline"), a Delaware corporation, and ANR Storage Company ("Storage"), a Michigan corporation, originally brought this action against MPSC seeking a declaratory judgment that MPSC could not constitutionally require them to obtain MPSC's advance approval before issuing and selling long-term securities. After MPSC filed a motion to dismiss the complaint on several grounds including the Eleventh Amendment, plaintiffs-appellants filed a motion for leave to file an amended complaint adding the three members of MPSC, defendants-appellees Eric J. Schneidewind, Matthew E. McLogan, and Edwyna G. Anderson, in their official capacities, as additional parties. On September 7, 1984, the District Court filed an order granting plaintiffs-appellants' motion to file an amended complaint. The order also dismissed MPSC as a defendant. Plaintiffs-appellants have not appealed from that order.

The parties stipulated that the District Court should decide the case on the basis of a stipulation of facts, an appendix to the stipulation of facts, plaintiffs-appellants' answers to three sets of interrogatories, and plaintiffs-appellants' replies to two sets of requests for admissions. After hearing oral arguments, the District Court ruled that plaintiffs-appellants could not lawfully issue and market long-term securities without obtaining a prior order of approval from MPSC. The District Court further declared that defendants-appellees, in their official capacities as members of MPSC, have the jurisdiction and

authority to regulate, approve or disapprove the issuance of plaintiffs-appellants' long-term securities.

FACTS

Plaintiffs-appellants are wholly-owned subsidiaries of American Natural Resources Company ("ANR"), a diversified holding company incorporated in Delaware. The principal offices of all three companies are located in Detroit, Michigan. Since plaintiffs-appellants are "natural-gas companies,"[3] the Federal Energy Regulatory Commission ("FERC") exercises general regulatory jurisdiction over their facilities and operations, including transportation, storage, sales (for resale), rates and charges, construction of new facilities, extension or abandonment of service and facilities, and certain other matters. This jurisdiction includes the authority to review and consider specific long-term financing plans for particular construction projects. FERC, however, does not review plaintiffs-appellants' short-term financing or non-construction financing. Because plaintiffs-appellants do not use any facilities in, or otherwise engage in, any local or intrastate natural gas operations of any kind, MPSC does not exercise general regulatory jurisdiction over plaintiffs-appellants' facilities or operations.

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[3] Title 15 U.S.C. § 717a(6) defines a "natural-gas company" as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." Defendants-appellees argue that Storage is not a "natural-gas company" because gas storage does not qualify as "the transportation [or sale] of natural gas in interstate commerce." We cannot agree. In *Columbia Gas Transmission Corp. v. Exclusive Gas Storage Easement*, 776 F.2d 125 (6th Cir. 1985), this Court recognized that "the transportation of natural gas in interstate commerce" includes the storage of natural gas by stating: "Underground gas storage facilities are a necessary and integral part of the operation of piping gas from the area of production to the area of consumption." *Id.* at 129 (quoting the district court's opinion).

Pipeline owns and operates an interstate natural gas pipeline system which transports and sells gas, for resale only, to 51 gas distribution customers in Michigan, Wisconsin, Iowa, Illinois, Indiana, Kansas, Missouri, Ohio, and Tennessee. Pipeline does not have any direct retail customers in Michigan and does not have plans for any. Although Pipeline derives most of its revenues from the sale of gas at wholesale, Pipeline also provides storage and transportation services for other gas companies by using extensive underground gas transmission pipelines and gas storage facilities located in Michigan and in other states.

Pipeline purchases natural gas from producers in Texas, Oklahoma, Kansas, Louisiana, and Wyoming and uses large diameter, cross-country pipelines to transport the gas, primarily to the states of Michigan and Wisconsin. During 1983, Pipeline sold 555 billion cubic feet of gas to its customers; over fifty percent of Pipeline's 1983 sales were in Michigan, approximately forty-five percent in Wisconsin and less than five percent in other states. Pipeline delivers all the gas that the company transports to Wisconsin directly to gas distribution utilities for immediate resale to their customers. Pipeline delivers most of the gas transported to Michigan directly to gas distribution utilities but also occasionally injects relatively minor volumes of gas into storage.

ANR organized Storage in 1978 to develop and operate gas storage reservoirs to store gas for non-affiliated customers. Storage operates four storage fields in the northern portion of Michigan's lower peninsula. Storage does not sell natural gas. During the summer, Storage receives natural gas from another pipeline company and stores the gas in one or more of the four storage fields.[4] Upon demand of its customers, Storage redelivers the natural gas to the pipeline company. All of the

[4] In the natural gas industry, pipeline companies commonly employ a practice known as "displacement," whereby the companies exchange equivalent volumes of natural gas at a mutually convenient place in lieu of actual physical delivery of the gas.

natural gas that Storage stores comes from outside the state of Michigan. Upon withdrawal of the natural gas from Storage's facilities, Storage's customers ultimately use the gas outside of Michigan.

Since its creation in 1939 and except for the period 1970-1979, MPSC has exercised authority over the securities that Pipeline or its predecessor, Michigan Wisconsin Pipe Line Company, has issued. After the decision of the Michigan Court of Appeals in *Great Lakes Transmission Co. v. Michigan Pub. Serv. Comm'n*, 24 Mich. App. 77, 180 N.W.2d 59 (1970), MPSC advised Pipeline (then Michigan Wisconsin Pipe Line Company) that, pursuant to the advice of its legal division, MPSC did not have jurisdiction to regulate the issuance of Pipeline's securities. Accordingly, Pipeline did not file securities applications from 1970 until the decision of the Supreme Court of Michigan in *Michigan Gas Storage v. Public Serv. Comm'n*, 405 Mich. 376, 275 N.W.2d 457, *reh'g denied*, 406 Mich. 1118 (1979). After that decision, Pipeline has filed seven applications to issue securities. All seven applications raised the question of MPSC's jurisdiction, but the parties have not litigated the issue until now.

Since 1979, MPSC has approved all seven of Pipeline's applications to issue securities. In each case, MPSC granted authorization for Pipeline to issue and sell the amount and type of securities that Pipeline had requested. In one instance, MPSC did not grant authorization for the issuance until slightly more than eight months after Pipeline applied for the authorization. MPSC granted the other six authorizations in between three and six weeks. On one occasion, however, Pipeline filed an application for approval of proposed security issuances which included guaranteeing certain financing by a subsidiary company. Instead of promptly approving the application as it had done in the past, MPSC issued a "Notice of Inquiry" and set the matter for hearing. Thereafter, Pipeline

withdrew the original application and filed a substitute application, which omitted the guarantee. MPSC approved the substitute application.

MPSC has also exercised authority over securities that Storage has issued since 1979. During that time, MPSC has unconditionally approved all three of Storage's applications in between three and six weeks. On one occasion, however, Storage withdrew an application after a MPSC representative advised the company that MPSC would hold hearings on the application. After ANR and MPSC reached a settlement regarding ANR's divestiture of Michigan Consolidated Gas Company, Storage filed a substitute application which MPSC approved. Storage's applications also raised the issue of MPSC's jurisdiction.

Since the natural gas industry is a capital-intensive industry, the issuance of various forms of securities is an essential aspect of plaintiffs-appellants' businesses. Pipeline, for example, uses short-term debt to finance the build-up of gas balances until the heating season begins and to finance capital expenditures, such as the construction of natural gas transmission and storage facilities, pending long-term financing. Pipeline uses various forms of long-term financing including common and preferred stock, first mortgage bonds, debentures and preferred stock, first mortgage bonds, debentures, and unsecured notes. Pipeline plans to issue approximately 50 million dollars in securities in 1986, not including potential refunding of debts, and approximately 100 million dollars in securities during 1987. Pipeline plans to use the proceeds from such securities issuances to assist in financing construction projects costing approximately 560 million dollars. Of this total, Pipeline plans to spend approximately 50 million dollars constructing projects in the state of Michigan. Storage plans to issue 27 million dollars in securities during 1987. FERC requires the filing of an application for a "certificate of public convenience and necessity" on these projects and may impose specific conditions on financing.

Plaintiffs-appellants use national and international financial markets to issue and sell their securities. When plaintiffs-appellants need capital they usually hire an international Wall Street investment banker to raise the required funds. The investment banker explores the international and national financial markets, determines the most advantageous method and source of raising the necessary funds, and proceeds with the issuance and marketing of the securities. In some cases, however, plaintiffs-appellants have obtained financing directly from national or international banks. In all cases, Michigan investors are involved with these security issuances only to the extent that they operate and invest in these international and national financial markets.

DISCUSSION

I.

Initially, plaintiffs-appellants contend that since FERC exclusively regulates their operations, facilities, and rates and since all their operations constitute the transportation or sale of natural gas in interstate commerce, the NGA has preempted Act 144's provision requiring "natural-gas companies" to obtain MPSC's approval before issuing long-term securities. In *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982), the Supreme Court summarized the basic principles governing the federal preemption of state regulation:

> Pre-emption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a

field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S 132, 142-143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Id. at 152-153 (additional citations omitted).

Applying this analytical framework, we note that Michigan enacted a predecessor to Act 144 in 1909. We agree with the District Court that "neither the NGA nor the federal Securities Act of 1933... contains express preemptive language with respect to utilities securities transactions...." Accordingly, we conclude that Congress has not explicitly preempted Act 144.

Having concluded that Congress has not explicitly preempted Act 144, we next consider whether federal law implicitly preempts the "advance approval" form of securities regulation. During this inquiry, we "start[] with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). As recently

as *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 106 S. Ct. 2369 (1986), the Supreme Court stated:

> [W]e have consistently emphasized that the first and fundamental inquiry to any pre-emption analysis is whether Congress intended to displace state law, and where a congressional statute does not expressly declare that state law is to be preempted [sic], and where there is no actual conflict between what federal and state law prescribe, we have required that there be evidence of a congressional intent to preempt the specific field covered by the state law.

Id. at 2372 (citations omitted).

The Supreme Court has acknowledged that both the NGA and the Natural Gas Policy Act of 1978 ("NGPA"), codified at 15 U.S.C. §§ 3301-3432, form a "comprehensive" national gas policy. *See Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd.*, 106 S. Ct. 709, 716 (1986). Although both the NGA and the NGPA contemplate a "comprehensive gas policy," neither the NGA nor the NGPA contain an "advance approval" form of utility securities regulation. Such omissions in a "comprehensive" regulatory scheme arguably preempt state regulation in the field. In *Transcontinental Gas Pipe Line Corp.*, the Supreme Court stated:

> A federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision *to* regulate.

Id. at 717 (quoting *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S 375, 384 (1983)) (emphasis in original). Consequently, we conclude that by not requiring the "advance approval" of the issuance of securities by "natural-gas companies" in an otherwise "comprehensive" regulatory scheme, Congress has implicitly determined that the States should not impose such regulations.

Furthermore, by requiring "natural-gas companies" to submit detailed financing plans as part of the application process for a "certificate of public convenience and necessity," FERC, at least implicitly, regulates those financing plans. Under 15 U.S.C. § 717f(c)(1)(A), a "natural-gas company" must obtain a "certificate of public convenience and necessity" before constructing, expanding, acquiring, or operating any facility involved in the transportation or sale of natural gas.[5] Under its regulatory authority, FERC has promulgated extensive regulations entitled "Applications for Certificates of Public Convenience and Necessity and for Orders Permitting and Approving Abandonment Under Section 7 of the Natural Gas Act, as Amended, Concerning Any Operation, Sales, Service, Construction, Extension, Acquisition or Abandonment." *See* 18 C.F.R. Part 157, Subpart A. As part of those regulations, 18 C.F.R. § 157.14(a)(14)[6] requires an applicant to file with

(Text continued on page A-14)

[5] Title 15 U.S.C. § 717f(c)(1)(A) provides in pertinent part:

No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . . .

[6] Title 18 C.F.R. § 157.14(a) (1985) provides in pertinent part:

(a) *To be attached to each application.* All exhibits specified shall accompany each application when tendered for filing. Together with each exhibit applicant shall set forth a full and complete explanation of the data submitted, the manner in which it was obtained, and the reasons for the conclusions which are derived therefrom . . . .

. . . .

(14) *Exhibit L — Financing.* Plans for financing the proposed facilities for which the application is filed, together with:

(i) A detailed description of applicant's outstanding and proposed securities and liabilities, showing amount (face value and number),

interest or dividend rate, dates of issue and maturity, voting privileges, and principal terms and conditions applicable to each.

(ii) The manner in which applicant proposes to dispose of securities by private sale, competitive bidding or otherwise; the persons, if known, to whom they will be sold or issued together with letters of intent, if any, and if not known, the class or classes of such persons.

(iii) A statement showing for each proposed issue, by total amount and by unit, the estimated sale price and estimated net proceeds to the applicant.

(iv) An itemized statement of estimated expenses, fees, and commissions to be paid by applicant in connection with each proposed issue.

(v) A statement showing whether the consent of any holder of any security is necessary to permit the issuance of the additional securities proposed, and whether, as to the proposed issue of securities, a like restriction is to be made applicable to any securities issued thereafter.

(vi) Statement of anticipated cash flow, including provision during the period of construction and the first 3 full years of operation of proposed facilities for interest requirements, dividends, and capital retirements.

(vii) Statement showing, over the life of each issue, the annual amount of securities which applicant expects to retire through operation of a sinking fund or other extinguishment of the obligation.

(viii) A balance sheet and income statement (12 months) of most recent date available.

(ix) Comparative pro forma balance sheets and income statements for the period of construction and each of the first 3 full years of operation, giving effect to the proposed construction and proposed financing of the project.

(x) Conformed copies of all agreements, contracts, mortgages, deeds of trust, indentures, agreements to advance materials or supplies or render services in return for applicant's securities, underwriting agreements, and any other agreements or documents of a similar nature.

(xi) Conformed copies of all reports, letters, or other documents, submitted by applicant to underwriters, insurance companies, or others regarding financing, including business studies, forecasts of

FERC a detailed plan for financing, including a description of the proposed securities as to amount, interest or dividend rate, date of issuance, principal terms and conditions, estimated expenses, manner of issue, manner of extinguishment of the obligation, and other pertinent information.[7] Under 15 U.S.C. § 717f(e), FERC has "the power to attach to the issuance of the certificate [of public convenience and necessity] and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." By requiring "natural-gas companies" to submit information regarding financing as part of the application process for a "certificate of public convenience and necessity" and then issuing the certificate, FERC, at least implicitly, has approved the financing plan.

Using a preemption analysis, in *Natural Gas Pipeline Co. v. Illinois Commerce Comm'n*, 33 Ill. 2d 214, 210 N.E.2d 490 (1965), the Supreme Court of Illinois held that the Illinois Commerce Commission did not have the authority to regulate the issuance of securities that natural gas companies issue to finance the construction and acquisition of facilities subject to the jurisdiction of the Federal Power Commission, the predecessor of FERC, under the NGA. The court noted that Congress

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earnings, and other similar financial or accounting reports, statements, or documents.

(xii) Conformed copies of all applications and supporting exhibits, registration statements, or other similar submittals, if any, to the Securities and Exchange Commission, including all supplements, changes or modifications of the above.

(xiii) Any additional data and information upon which applicant proposes to rely in showing the adequacy and availability to it of resources for financing its proposed project.

[7] We note that in *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, the Supreme Court stated: "Federal regulations have no less preemptive effect than federal statutes." 458 U.S. at 153.

amended section 7 of the NGA, four years after its original passage. *See* Act of February 7, 1942, ch. 49, 56 Stat. 83. In *Federal Power Comm'n v. Hunt*, 376 U.S. 515 (1964), the Supreme Court stated:

> The purpose of the amendments was to give "the Commission an opportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure . . . at a time when such vital matters can readily be modified as the public interest may demand . . . ." House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1290, 77th Cong., 1st Sess., 2-3.

Id. at 525. Finally, the court rejected the Illinois Commerce Commission's argument that both federal and state regulations could logically and practically exist:

> [W]hen the State regulation would directly or indirectly "affect the ability of the Federal Power Commission to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act" or creates the "prospect of interference with the federal regulatory power," then the State regulation must yield "although collision between the state and federal regulation may not be an inevitable consequence." *Northern Natural Gas Co. v. State Corp. Comm[']n] of Kansas*, 372 U.S. 84, 91-92, 83 S. Ct. 646, 651, 9 L.Ed.2d 601, 607-608.

210 N.E.2d at 494.

Once FERC has approved a project and the underlying financing plan, a state cannot reject either the project or the financing plan. Even if Congress has not implicitly displaced state regulation in the natural gas industry, the Supremacy

Clause invalidates state regulation to the extent that it conflicts with federal regulation. The "advance approval" form of state regulation involved in this case presents at least the possibility of a conflict between federal and state regulation. A direct conflict between FERC and MPSC could easily occur where FERC, acting in the national interest, authorizes the construction of facilities in a state other than Michigan, requiring the issuance of additional securities, and MPSC, acting in a perceived local interest, refuses to approve the issuance of securities. For example, FERC could approve a "natural-gas company's" request to build a $1 billion pipeline to Maine because the Northeast needs additional supplies of natural gas even though the project would increase the cost of natural gas by ten percent to all consumers served by this pipeline. Since the pipeline would raise the cost to Michigan consumers without a "local" benefit, MPSC might reject the proposal.

Although MPSC has not rejected a securities issuance or project that FERC had previously approved, the "imminent possibility" of such an occurrence requires that we declare Act 144 unconstitutional. In *Maryland v. Louisiana*, 451 U.S. 725 (1981), the Supreme Court stated that the "'imminent possibilty of collision'" between the Louisiana tax on the "first use" of natural gas and FERC's authority required that the Court hold the Louisiana tax unconstitutional. *See also Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 92, *reh'g denied*, 372 U.S. 960 (1963) ("although collision between the state and federal regulation may not be an inevitable consequence, there lurks such [an] imminent possibility of collision in orders purposely directed at interstate wholesale purchasers that the orders must be declared a nullity in order to assure the effectuation of the comprehensive federal regulation ordained by Congress"). Consequently, we hold that the NGA and the accompanying federal regulations implicitly preempt Act 144.

II

Plaintiffs-appellants additionally argue that Act 144 violates the commerce clause. We agree. As recently as *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 106 S. Ct. 2080 (1986), the Supreme Court summarized the analysis the Court applies when determining whether state regulation violates the commerce clause:

> This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. . . . When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.

106 S. Ct. at 2084 (citation omitted). In *Brown-Forman Distillers Corp.*, the Supreme Court held that a New York law, requiring every liquor distiller or producer that sells liquor to wholesalers within the State to sell at a price that does not exceed the lowest price the distiller charges wholesalers anywhere else in the United States, violated the commerce clause under the first tier. The Supreme Court reasoned: "Forcing a merchant to seek regulatory approval in one State before

undertaking a transaction in another directly regulates interstate commerce." *Id.* at 2086 (citations omitted). Likewise, in this case, a requirement that plaintiffs-appellants obtain "advance approval" from MPSC before issuing securities, the proceeds of which may be used to finance a project in another State, directly regulates interstate commerce. Consequently, we hold that Act 144 directly burdens interstate commerce.

Accepting the Supreme Court's analysis in *Brown-Forman Distillers Corp.* that "there is no clear line separating the category of state regulation that is virtually *per se* invalid... and the category subject to the *Pike v. Bruce Church* balancing approach," 106 S. Ct. at 2084, we proceed to the second tier. In *Pike v. Bruce Church, Inc.*, 397 U.S 137 (1970), the Supreme Court applied a "balancing of interests" test to determine whether state regulation exceeds commerce clause limitations:

> Where [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142 (citation omitted).

Defendants-appellees argue that Act 144 serves several important objectives. In *Michigan Gas Storage v. Public Serv. Comm'n*, 405 Mich. 376, 275 N.W.2d 457 (1979), the Supreme Court of Michigan stated that:

> [O]ne of the goals of securities regulation... was to protect investors against the evils of over-capitalization.... Proper securities regulation serves the interests of the ratepayers in assuring continued service without interruption from utilities and in receiving that service at

> reasonable rates. For example, physical property of a company within the state, essential to the company's ultimate service to the public, could be jeopardized by inadequate financing, resulting in a failure in that service.

Id. at 390–91. In essence, the District Court ruled that these benefits outweigh any burdens that Act 144 imposes on interstate commerce. We cannot agree. An analysis of the alleged benefits reveals that they do not further important state interests. The problem of overcapitalization is largely related to the construction, expansion, and acquisition of natural gas facilities. FERC, however, exercises sufficient control over such decisions by issuing "certificates of public convenience and necessity." We cannot see any benefit in MPSC's approving the financing for a project that FERC has already approved. Under the Supremacy Clause, MPSC cannot refuse to approve the issuance of securities for a project that FERC has already approved. FERC also regulates the rates that "natural-gas companies" can charge. Since plaintiffs-appellants do not engage in any intrastate sales of natural gas, MPSC cannot regulate plaintiffs-appellants' rates.[8]

Several state courts have held that state regulation requiring advance approval for the issuance of securities by companies engaged in interstate commerce unconstitutionally burdens interstate commerce. *See, e.g., Panhandle Eastern Pipeline Co. v. Public Utilities Comm'n*, 56 Ohio St. 2d 334, 383 N.E.2d 1163 (1978); *State Utilities Comm'n v. Southern Bell Telephone and Telegraph Co.*, 288 N.C. 201, 217 S.E.2d 543 (1975); *United Air Lines, Inc. v. Illinois Commerce Comm'n*, 32 Ill. 2d 516, 207

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[8] Defendants-appellees have adopted contradictory positions during this litigation. When discussing the burdens that Act 144 imposes on interstate commerce, defendants-appellees portray MPSC's approval of an application to issue securities as almost automatic. When discussing the benefits of Act 144, however, defendants-appellees emphasize MPSC's ability to influence the decision-making of natural gas utilities.

N.E.2d 433 (1965); *In re United Air Lines, Inc.*, 172 Neb. 784, 112 N.W.2d 414 (1961). *Contra Michigan Gas Storage v. Public Serv. Comm'n*, 405 Mich. 376, 275 N.W.2d 457, *reh'g denied*, 406 Mich. 1118 (1979); *Indiana and Michigan Power Co. v. Public Serv. Comm'n*, 405 Mich. 400, 275 N.W.2d 450, *reh'g denied*, 406 Mich. 1119 (1979). In *United Air Lines, Inc. v. Illinois Commerce Comm'n*, *supra*, the Supreme Court of Illinois held that the Illinois statute requiring the "advance approval" of United's securities unconstitutionally burdened interstate commerce. During its discussion, the court stated:

> If Illinois can exercise the power to approve or disapprove the issuance of United's securities because it transacts business here, then so also can each of the other sixteen States where United provides intrastate service. There would thus be a total of seventeen jurisdictions asserting the power to approve or reject any issuance of stock proposed by United. The task of seeking and gaining approval from such a number of States would be unjustifiably expensive, time consuming and burdensome, and could create delay which would directly impair the usefulness of United facilities for interstate traffic. Just as important, each independent regulating authority would be required to apply locally defined standards of public interest and locally defined rules in order to approve or disapprove or . . . to conditionally approve a single issuance of securities. The result, we believe, would be chaotic. The issuance of securities is a single, indivisible act. It cannot be fractionalized and given portions allocated to specific States.

207 N.E.2d at 438. We conclude that the burdens of expense, delay, and administrative hassle of "advance approval"

securities regulation far outweigh the benefits, if any, of Michigan's interests in protecting consumers and investors. Consequently, we hold that Act 144 unconstitutionally burdens interstate commerce.

Accordingly, we reverse the judgment of the District Court and remand this action to the District Court with instructions to enter a declaratory judgment for plaintiffs-appellants.

UNITED STATES OF AMERICA
DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANR Pipeline Company and
ANR Storage Company,
Plaintiffs,

Case No.
G84-438 CA

-vs-

Eric J. Schneidewind,
Matthew E. McLogan, and
Edwyna G. Anderson,
Defendants.

ORDER

In accordance with the opinion filed this date,

IT IS ORDERED that plaintiffs, ANR Pipeline Company and ANR Storage Company, may not lawfully issue and market their securities without obtaining a prior order of approval from the Michigan Public Service Commission.

IT IS FURTHER ORDERED that defendants, Eric J. Schneidewind, Matthew E. McLogan and Edwyna G. Anderson, in their official capacities, have jurisdiction, power and authority to regulate, approve or disapprove the issuance of marketing of securities by plaintiffs ANR Pipeline Company and ANR Storage Company.

IT IS FURTHER ORDERED that plaintiffs' First Amended Complaint for Declaratory Judgment is dismissed, with prejudice, and that judgment shall be entered for defendants on both counts of that First Amended Complaint, with costs to be taxed.

/s/ Douglas W. Hillman

Douglas W. Hillman
District Judge

Dated: August 22, 1985

UNITED STATES OF AMERICA
DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANP Pipeline Company and
ANR Storage Company,
Plaintiffs,

-vs-

Eric J. Schneidewind,
Matthew E. McLogan, and
Edwyna G. Anderson,
Defendants.

Case No.
G84-438 CA

OPINION

I. INTRODUCTION

This is an action for declaratory relief challenging defendants' assertion of jurisdiction over plaintiffs' securities issues under the Michigan public utilities securities statute, M.C.L.A. 460.301, *et seq*, M.S.A. 22.101, *et seq*., (hereinafter referred to as "Act 144"). The Michigan Public Service Commission (MPSC), originally a named defendant, was dismissed from the case by opinion and order entered on September 7, 1984. The remaining defendants are Eric J. Schneidewind, member and chairperson of the MPSC, and Matthew E. McLogan and Edwyna G. Anderson, the remaining two members of the MPSC, all in their official capacities.

The record in the case consists of a written stipulation of facts, an appendix thereto, the pleadings, plaintiffs' answers to three sets of interrogatories and plaintiffs' replies to two sets of requests for admissions. The parties have stipulated that the case should be determined on this record. The parties have submitted briefs on the legal issues to be decided, and the Court has heard oral arguments on those issues.

On the stipulated record, the following issues have been submitted to the court for decision: (1) whether federal regulatory schemes applicable to plaintiff companies have preempted that state regulation of securities issues provided by Act 144; (2) whether application of Act 144 to plaintiffs violates the Commerce Clause of the United States Constitution because (a) such application so infringes on national uniformity requirements as to materially and unreasonably burden interstate commerce, and/or (b) such application otherwise so materially and unreasonably burdens interstate commerce. On these grounds, plaintiffs seek a judgment declaring that the defendant commissioners, in their official capacities, have no jurisdiction to regulate or otherwise interfere with plaintiffs' securities issues and plaintiffs may therefore lawfully issue their securities without obtaining the prior approval of defendants.

II. DISCUSSION

A. *Facts*. Because the stipulation of facts is part of the record, only the minimum facts necessary to frame and resolve the legal issues will be restated here.

Plaintiffs ANR Pipeline Company ("Pipeline Company"), a Delaware corporation, and ANR Storage Company ("Storage Company"), are wholly-owned subsidiaries of American Natural Resources Company ("ANR"), a diversified holding company incorporated in Delaware. The principal offices of ANR, Pipeline Company, and Storage Company are located in Detroit, Michigan.

Pipeline Company owns and operates an interstate natural gas pipeline system which transports and sells natural gas for resale only to 51 gas distribution customers in Michigan, Wisconsin, Iowa, Illinois, Indiana, Kansas, Missouri, Ohio and Tennessee. Pipeline Company has no direct retail customers in Michigan.

Pipeline Company operates 15 gas storage fields in Michigan. Eight of those fields are owned by Michigan Consolidated Gas Company ("MCGC") and leased to Pipeline Company. Pipeline Company owns and operates 773 miles of gas transmission pipeline and associated equipment located in Michigan, including two multiple, large-diameter pipelines entering Michigan from Indiana,[1] one such pipeline entering Michigan from Ohio, and two transmission lines extending between Wisconsin and Michigan in the upper peninsula. Pipeline Company also owns and operates 195 miles of field and storage pipelines, two transmission compressor stations and ten underground storage compressor stations in Michigan.[2] In 1983, over 50% of Pipeline Company's sales were in Michigan, approximately 45% in Wisconsin, and less than 5% in other states.

Storage Company operates gas storage reservoirs to store gas for nonaffiliated customers. Storage Company does not sell natural gas. Four storage fields are presently operational in Michigan, all located in Kalkaska County in the northern lower peninsula. These fields are connected to transmission pipeline of Great Lakes Gas Transmission Company ("Great Lakes") in Crawford County by approximately 24 miles of Storage Company's underground storage lines.

During the summer, natural gas from Great Lakes is delivered to Storage Company by displacement, a commonly employed pipeline company practice of exchanging equivalent

[1] The two pipelines entering Michigan from Indiana connect to three local gas distribution utilities in the western lower peninsula of Michigan: MCGC, Michigan Power Company and Michigan Gas Utilities Company.

[2] Outside the state of Michigan, Pipeline Company owns and operates 6,947 miles of gas transmission pipeline and associated equipment, 3,507 miles of gathering lines, 35 transmission compressor stations and 54 field compressor stations.

volumes of gas at a mutually convenient place in lieu of actual physical delivery of the storage gas. Storage Company stores the gas in one or more of its four gas storage fields and redelivers it on demand within contractual entitlement to Great Lakes for the account of the storage customer. The gas received and injected into storage is produced in Western Canada. The gas withdrawn and redelivered rejoins the gas stream flowing in Great Lakes' pipeline.

All of the gas stored by Storage Company is suppled by its customers outside of Michigan for transmission to Storage Company's facilities by displacement or otherwise. When withdrawn from storage, these volumes of gas are transmitted, by displacement or otherwise, back to Storage Company's customers for use outside the state of Michigan. Thus, Storage Company's customers use Great Lakes' pipeline to transport their gas to and from Storage Company's facilities. Storage Company's storage charges include the costs associated with transporting the gas to and from Great Lakes' transmission line through Storage Company's pipelines to and from the storage fields themselves. Storage Company takes and relinquishes possession of the storage gas at the Deward, Michigan, interconnection between its pipeline and the Great Lakes' transmission lines. In addition to its storage fields and lines, Storage Company has three compressor stations and associated gas injection and withdrawal facilities in Michigan.

Storage Company does not provide storage service to or for Pipeline Company. Storage Company's reservoirs and facilities are not engineered or used as pressure apparatus in, nor are they necessary to, the proper operation of Pipeline Company's system operations.

Storage Company has seven customers consisting of gas pipeline and transmission companies in Texas, Alabama, Missouri, Indiana, Tennessee and Manitoba. All but one of the customers use(d) Pipeline Company to transport their gas

to and from Storage Company facilities. One customer used Great Lakes. None of Storage Company's customers purchased their stored gas from Pipeline Company.

Pipeline Company is a "natural gas company," as that term is defined in the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.*,[3] and is therefore subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission ("FERC"). Pursuant to the NGA, the FERC has regulatory jurisdiction over (1) the interstate transportation of gas (including gas storage used to balance fluctuating demand with supplier deliveries), (2) the interstate sale of gas for resale, and (3) the natural gas companies engaged in such interstate transportation and sale for resale.[4] Accordingly, the FERC has jurisdiction over all of Pipeline Company's transportation, storage, sales for resale, rates and charges, construction of new facilities, extension or abandonment of services and facilities, and certain other matters. The FERC has further jurisdiction to review and consider specific long-term financing plans for particular construction projects.[5] The FERC requires issuance of certificates of public convenience and necessity for any significant expansion of the company's facilities or services,[6] but no FERC filings are necessary for short-term financing or for financing other than construction.

Storage Company, according to plaintiffs and as treated in FERC orders, is also a "natural gas company" under the

[3] 15 U.S.C. §717a(6) defines natural gas company as ". . . a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

[4] 15 U.S.C. §717(b).

[5] 15 U.S.C. §717f.

[6] 15 U.S.C. §717f(c)(1)(A).

NGA, thereby subject to FERC regulatory jurisdiction.[7] Storage Company, like Pipeline Company, holds certificates of public convenience and necessity issued by the FERC when required for significant expansions of facilities or services, but no FERC filings are required for short-term financing or for financing other than construction.

All parties agree that the FERC does (and the MPSC does not) exercise general regulatory jurisdiction over Storage Company's facilities and gas operations, and over all of Pipeline Company's transportation, storage, sales for resale, rates and charges, construction of new facilities, extension or abandonment of service and facilities, and certain other matters. Although lacking general regulatory jurisdiction over either plaintiff, the MPSC has exercised authority under Act 144 over securities issued by Pipeline Company since Pipeline Company was established in 1945, except for the period of 1970–1979.[8] Since 1979, Pipeline Company has received unconditional approval of all seven of its securities issue applications. Six applications gained approval within three to six weeks; the remaining application took 8 months to secure approval. The MPSC has exercised the same authority over securities issued by Storage Company, which was organized in 1978, continuously since 1979. During that period, Storage

[7] Although admitting that the FERC does exercise general regulatory jurisdiction over Storage Company's facilities and gas operations, defendants contend that the FERC has no such jurisdiction because gas storage, in their view, is not within the ambit of "sale or transportation of natural gas in interstate commerce."

[8] During the 1970's, the MPSC concluded that such security issuances were not subject to MPSC consideration under Act 144, pursuant to the Michigan Court of Appeals' decision in *Great Lakes Transmission Co. v. MPSC*, 24 Mich. App. 77, 180 N.W.2d 59 (1970). However, following and pursuant to the Michigan Supreme Court's decision in *Michigan Gas Storage Co. v. MPSC*, 405 Mich. 376, 275 N.W.2d 457 (1979), securities issuance applications were again filed with the MPSC under Act 144.

Company received unconditional approval of all three applications it submitted, each within three to six weeks. All applications filed since 1979 by either plaintiff have raised the issue of MPSC jurisdiction under Act 144, but the issue has never been litigated prior to this lawsuit.

B. Legal Issues

1. Preemption Claim

Plaintiffs claim that the federal regulatory schemes applicable to them have preempted the state regulation of securities issues provided by Act 144.

Act 144 provides that a utility may issue long-term securities only if authorized by the MPSC.[9] In passing on written applications for securities issuance, the MPSC is authorized

[9] M.C.L.A. 460.301(1), M.S.A. 22.101(1), provides, in pertinent part:

"A . . . corporation . . . organized or authorized to do business under the laws of this state . . . exercising or claiming the right to carry or transport natural gas for public use, directly or indirectly . . . or engaged in the business of piping or transporting natural gas for public use, directly or indirectly, or engaged in the business of purchasing natural gas for distribution may issue stocks, bonds, notes, or other evidences of indebtedness payable at periods of more than 12 months after the date of issuance, if necessary for the acquisition of property, the construction, completion, extension, or improvement of facilities or for the improvement or maintenance of service or for the discharge or lawful refunding of obligations and may issue stock to represent accumulated earnings invested in capital assets and not previously capitalized, if the Michigan public service commission issues an order authorizing the issue and the amount of the issue, and states that in the opinion of the commission the use of the capital or property to be acquired to be secured by the issue of the stock, bonds, notes, or other evidences of indebtedness, is reasonably required for the purposes of the . . . corporation . . . or that the issue of the stock fairly represents accumulated and undistributed earnings invested in capital assets and not previously capitalized . . ."

to investigate, hold hearings, examine witnesses and any written materials it deems of importance in reaching a determination.[10] The MPSC must grant authority for the issuance if it is "satisfied that the funds derived from the [securities] issue . . . are to be applied to lawful purposes and that the issue and amount is essential to the successful carrying out of the purposes," although the MPSC may impose reasonable terms and conditions on the grant of authority.[11]

State laws like Act 144 may be preempted by federal law in three different ways. *Michigan Canners & Freezers Assoc., Inc. v. Agricultural Marketing & Bargaining Board*, ____ U.S. ____; 104 S.Ct. 2518, 2522; 81 L.Ed.2d 399 (1984). Congress, in the federal enactment, may explicitly mandate preemption of state law. *E.g., Shaw v. Delta Airlines*, 464 U.S. ____; 103 S.Ct. 2890; 77 L.Ed.2d 490 (1983). Even absent express preemptive language, Congress may manifest an implied intent to occupy the field of regulation, thereby displacing state regulations in the same area. *E.g., Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Finally, state law is displaced to the extent it actually conflicts with federal law, even in the absence of express preemptive langauge or implied congressional intent to preempt. Such a conflict is recognized when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963), or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See also, Fidelity Federal Savings & Loan Ass'n.*, 458 U.S. at 153. Applying these principles to the facts of this case, I am satisfied that defendants' assertion of jurisdiction over plaintiffs' securities issues pursuant to Act 144 has not been preempted by federal law.

[10] M.C.L.A. 460.301(2); M.S.A. 22.101(2).

[11] M.C.L.A. 460.301(3); M.S.A. 22.101(3).

First, neither the NGA nor the federal Securities Act of 1933, 15 U.S.C. § 77, *et seq.*, contains express preemptive language with respect to utilities securities transactions, nor do they manifest Congressional intent to occupy the entire field of utilities securities transactions. Accordingly, plaintiffs rely on the third preemptive ground, namely, that state law is displaced to the extent it actually conflicts with federal law. Plaintiffs claim that Act 144 is potentially disruptive of the FERC's broad regulatory authority under the NGA and of the "delicate balance Congress created between this broad general regulation of natural gas companies under NGA and the type of regulation of security issuances by such companies provided by the federal securities statutes." On the basis of this "potential disruption", plaintiffs conclude that Act 144, as applied to them, is in actual conflict with and must be preempted by the combined effect of the referenced federal statutes. I disagree.

Under the NGA, the FERC has authority to review financing information in certificate proceedings, including authority to review and consider specific long-term financing plans for certain construction projects. *See* 15 U.S.C. § 717f(c) and (e); 18 C.F.R. 157.14(a)(14). The FERC also has authority to review financing information in rate matters pursuant to 15 U.S.C. §717d. *See* 18 C.F.R. 154.62 and .63. No FERC certification, however, is required for short-term financing or for financing unrelated to construction. Most significantly, nowhere does the NGA grant specific authority to the FERC to regulate the securities issues of natural gas companies. No FERC pre-issuance approval is required.

The federal Securities Act of 1933, 15 U.S.C. § 77, *et seq.*, (hereinafter the "1933 Act"), and the Michigan Uniform Securities Act, M.C.L.A. 451.501, *et seq.*; M.S.A. 19.776(101), *et seq.* generally govern securities transactions. Both schemes require prior disclosure by proposed securities issuers through filing of a registration statement. If the registration statement

discloses the statutorily required information, the statement automatically becomes effective 20 days after filing. *See*, 15 U.S.C. § 77h(a); M.C.L.A. 451.702(c) and .703(c). The objective of the 1933 Act was to "provide investors with full disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976). The Michigan Uniform Securities Act was similarly designed to protect the public from deception or fraud in securities transactions within the State of Michigan by requiring that certain securities and transactions be registered prior to issuance. *People v. Dempster*, 396 Mich. 700, 242 N.W.2d 381, 384 (1976).

Michigan's Act 144 is intended to protect both investors in utility securities, creditors of those utilities and utility ratepayers. In *Michigan Gas Storage Company v. Michigan Public Service Comm.*, 405 Mich. 376, 275 N.W.2d 457 (1979), the Michigan Supreme Court recognized that utilities securities regulation was intended to serve interests which facilities, service and rate regulation by the FERC might not be sufficient to protect. In addition to protecting investors from "the evils of overcapitalization," *Id.*, at 462, the Supreme Court identified the following additional objectives of Act 144:

> "... Proper securities regulation serves the interests of the ratepayers in assuring continued service without interruption from utilities and in receiving that service at reasonable rates. For example, physical property of a company within the state, essential to the company's ultimate service to the public, could be jeopardized by inadequate financing, resulting in a failure in that service. We see no reason to conclude that the Legislature would have intended to forego participation in regulating matters affecting interests with respect to which the state may properly exercise its protective powers because it is not also regulating some other aspects of the business."

Id.

Plaintiffs do not argue, nor could they, that joint compliance with the NGA, the 1933 Act, and Act 144 is a "physical impossibility." Instead, they claim that although joint compliance is physically possible, the "cumbersome and ill-defined" regulatory process under Act 144 may "potentially" delay, disrupt or disapprove proposed issuances needed to finance FERC approved projects. This "potential disruption," plaintiffs claim, stands as an obstacle to execution of the full objectives of the federal regulatory scheme, and hence must be deemed preempted by federal law.

The record reveals that since 1979, plaintiffs' combined securities issue applications, totaling 10, have all received unconditional approval under Act 144, with all but one of the 10 receiving that approval within three to six weeks. Accordingly, the average potential delay beyond the 20-day automatic effective date for registration statements under the 1933 Act is limited to three weeks or less. There is no indication that any FERC certification or rate proceeding has ever been disrupted or in any way affected by these Act 144 proceedings. Thus, compliance with both the federal and state regulations has historically been accomplished with minimal, if any, delay or disruption.

Further, Act 144 proceedings are well-defined. Short-term borrowings are exempt under Act 144. As to other borrowings, the MPSC's inquiry is "limited to whether there is a need to issue securities to obtain funds for a lawful purpose of the utility and does not extend to whether, to accomplish that purpose, there is need for the project to which the funds will be devoted." *Kelley v. Michigan Public Service Comm.*, 412 Mich. 385, 316 N.W.2d 187, 190 (1982). In other words, the reasonableness of the underlying project is not a material inquiry in such a proceeding; instead, the proceeding "is limited to a review of the financial decisions of the utility." *Id.*, at 193.

Although Act 144 authorizes the MPSC to hold hearings, examine witnesses, and make any inquiry or investigation it considers of importance in reaching a decision,[12] all ten of plaintiffs' combined applications since 1979 have been approved *ex parte*, without hearings.[13] Rather than bolstering plaintiffs' contentions, these facts tend to weaken their claim that Act 144's "cumbersome and ill-defined" regulatory process is potentially disruptive of or an obstacle to execution of the full objectives of the federal regulatory scheme.

In reviewing the legislative history and genesis of FERC regulatory jurisdiction under the NGA, the United States Supreme Court noted the following in *Panhandle Eastern Pipe Line Co. v. Comm'n.*, 332 U.S. 507, 520 (1947):

> "The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level. We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority."

The Supreme Court emphasized that the NGA was "motivated, designed and shaped to bring about more effective regulation ... particularly more effective state regulation," *Id.*, at 519, and observed that:

> "[t]he Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making

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[12] M.C.L.A. 460.301(2); M.S.A. 22.101(2).

[13] The stipulation of facts indicates two instances where applications were filed by plaintiffs and then withdrawn by them when the MPSC indicated that a hearing would be held. *See*, Stipulation of Facts, pp. 13 & 24. Plaintiffs cannot expect me to speculate on the "ill-defined and cumbersome" nature of a hearing process they have never submitted to.

> state regulations effective, by adding the weight of federal to supplement and reinforce it in the gap created by prior decisions. The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way."

Id., at 517-518.[14] The Supreme Court further explored the purpose of the NGA in *Maryland v. Louisiana*, 451 U.S. 725, 747-748 (1981):

> "In 1938, Congress enacted the Gas Act to assure that consumers of natural gas receive a fair price and also to protect against the economic power of the interstate pipelines . . . The Gas Act was intended to provide the Federal Power Commission, now the FERC, with authority to regulate the wholesale pricing of natural gas in the flow of interstate commerce from wellhead to delivery to consumers." (Citations omitted)

To that stated end, the NGA permits comprehensive regulation of facilities, services and rates of natural gas companies, but nowhere does it explicitly authorize the FERC to regulate the securities issuance of those companies. Further, review of financial data in the context of certificate or rate proceedings is not the functional equivalent of requiring pre-issuance approval by FERC, and no FERC review is even required for short-term financing or financing unrelated to construction.

Plaintiffs insist that an inextricable connection exists between a company's rates, services and facilities, on the one hand, and its method of financing on the other. They conclude that regulation of securities issuance under Act 144 therefore creates in impermissible "prospect of interference with the federal regulatory power" over plans for financing,

[14] The regulatory "gap" created by prior decisions was that between wholesales of natural gas in interstate commerce, strictly committed to exclusive federal regulation, and direct sales for consumptive uses. *See, Northern Natural Gas Co. v. Kansas Comm'n*, 372 U.S. 84, 91 (1963).

construction or extension of facilities under the NGA. Plaintiffs' own history of successful joint compliance with the NGA, the 1933 Act and Act 144 belies such an assertion. Unlike *Northern Natural Gas Co. v. Kansas Comm'n*, 372 U.S. 84 (1963), on which plaintiffs rely, collision between Act 144 and the federal regulations is neither an inevitable consequence nor an "imminent possibility," such that Act 144 must be declared a nullity in order to assure effectuation of Congress' comprehensive federal regulations.

Furthermore, the legislative history and express terms of the NGA, as interpreted by the Supreme Court, reveal a calculated intent on the part of Congress to permit the coexistence of the NGA and existing state regulation, such that state regulatory power would not be handicapped or diluted in any way by the NGA. Finally, there may come a time when Congress determines that state securities regulation of natural gas companies is inconsistent with federal policy and appropriately seeks to amend the NGA to give the FERC or some other federal agency express and exclusive authority over such issuances. Until then, the "potential disruption" of which plaintiffs complain is purely hypothetical. Plaintiffs fear but can point to no instance where a security issuance presented to defendants prevented a FERC certified project from going forward. In fact, plaintiffs can point to no instance of actual disruption of FERC authority under the NGA by virtue of any of defendants' assertions of jurisdiction under Act 144.

As the Supreme Court observed in *Arkansas Elec. Coop. v. Arkansas Public Service Comm'n.*, 461 U.S. 375 (1983):

> "Maintaining the proper balance between federal and state authority in the regulation of electric and other energy utilities has long been a serious challenge to both judicial and congressional wisdom. On the one hand, the regulation of utilities is one of the most important of the functions traditionally associated with the police power of

the States . . . On the other had, the production and transmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests." (Citations omitted) *Id.*, at 377.

* * *

"There may come a time when the REA changes its present policy, and announces that state rate regulation of rural power cooperatives is inconsistent with federal policy . . . We will not, however, in this facial challenge to the PSC's mere assertion of jurisdiction, assume that such a hypothetical event is so likely to occur as to preclude the setting of any rates at all." (Citations omitted) *Id.*, at 389.

On the record before me, I am similarly unwilling, on this facial challenge to the defendants' mere assertion of jurisdiction under Act 144, to assume that the "potential disruption or interference" which plaintiffs fear is so likely to occur as to preclude any regulation of securities issuances under Act 144 at all. I conclude that compliance with both federal and state regulations is not a physical impossibility, and Act 144 does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Accordingly, I hold that regulation of securities issuance under Act 144 is not preempted by federal law.

2. *Commerce Clause Claims*

The power of the States to impose burdens on or interfere with interstate commerce is impliedly limited by the Commerce Clause. *Western & Southern Life Insurance Co. v. Board of Equalization*, 451 U.S. 648, 652 (1981). Whether state regulation exceeds Commerce Clause limitations is determined by a

"balance-of-interests" approach reformulated and expressed in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> "Where [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." (Citations omitted)

The *Bruce Church* test, explicitly endorsed as the modern jurisprudential approach to Commerce Clause questions, gives state regulation more latitude than earlier formalistic, "bright-line" approaches. *Arkansas Elec. Coop.*, 461 U.S. at 390.

The initial inquiry under *Bruce Church* involves the nature of the local public interest(s) served by the regulation. The Michigan Supreme Court discussed those interests in two cases consolidated for hearing and argument: *Michigan Gas Storage Co. v. MPSC*, 405 Mich. 376, 275 N.W.2d 457 (1979), and *Indiana & Michigan Power Co. v. State of Michigan*, 405 Mich. 400, 275 N.W.2d 450 (1979). It concluded that regulation of securities issuances under Act 144 was motivated "by the evils and injurious effects on the public of overcapitalization," and "was intended to, and does, protect interests which rate regulation alone could not effectively control." *Indiana & Michigan Power Co.*, 275 N.W.2d at 453.

> "Proper securities regulation serves the interests of the ratepayers in assuring continued service without interruption from utilities and in receiving that service at reasonable rates. For example, physical property of a company within the state, essential to the company's ultimate service to the public, could be jeopardized by inadequate financing, resulting in a failure in that service.

> We see no reason to conclude that Legislature would have intended to forego participation in regulating matters affecting interests with respect to which the state may properly exercise its protective powers because it is not also regulating other aspects of the business."

Michigan Gas Storage Co., 275 N.W.2d at 462.

> "It serves the interests of both the investors in, and creditors of, a company organized and operating and issuing securities under the law of this state and those of ratepayers in efficient and uninterrupted service at reasonable rates."

Indiana & Michigan Power Co., 275 N.W.2d at 453.

It is true, as plaintiffs point out, that both of these cases are factually distinguishable from the case at bar. However, those factual differences, while deserving discussion, do not, I believe, alter the applicability of the Michigan Supreme Court's conclusions to the case before the court.

Michigan Gas Storage Co. was a Michigan corporation and a wholly owned subsidiary of Consumers Power Company, a Michigan public utility. Michigan Gas Storage purchased natural gas in interstate commerce and sold all of it to Consumers Power. Consumers then sold the natural gas at retail to the public. Michigan Gas Storage Company had no facilities or significant assets outside Michigan and there was no evidence on whether or how much, if any, of the gas it sold to Consumers Power was ultimately consumed outside the State. Indiana & Michigan Power Company was also a Michigan corporation organized solely to acquire, complete construction of and operate the Donald C. Cook Nuclear Electricity Generating Plant and to sell the electricity generated thereby to its parent, Indiana & Michigan Electric Company, an Indiana corporation, which then sold the electricity retail in Michigan and Indiana. All of Indiana & Michigan Power Company's facilities and assets were located in Michigan and its sales to the parent company occurred strictly intrastate.

In the case at bar, Storage Company's operations, facilities and assets are all located in Michigan. It is a Michigan corporation. Although all of its gas storage customers are located outside Michigan, the service contracts with those customers are usually negotiated in Michigan. Power Company, although not a Michigan corporation, operates 15 gas storage fields and close to 800 miles of gas transmission pipelines and associated equipment in Michigan. In 1983, over 50% of its sales were within the State of Michigan. Its pipelines entering the State of Michigan connect with the State's primary local gas distribution utilities which then sell the gas at retail to the consuming public.

I am satisfied that the Michigan Supreme Court's conclusions in *Michigan Gas Storage Co.* and *Indiana & Michigan Power Co.* are properly applicable to this case, given these strong Michigan connections. The same local public interests are served by regulation of plaintiffs under Act 144 as were served by regulation of Michigan Gas Storage Company and Indiana & Michigan Power Company in the two cited cases. A financial failure of either Storage Company or Pipeline Company due to overcapitalization would directly impact on this State, either upon the customers of the local gas distribution utilities who receive and resell Pipeline Company's gas, or those involved, directly or indirectly, with Storage Company's wholly intrastate storage facilities and operations. The pipelines and storage fields of both plaintiffs within Michigan affect private property rights of Michigan citizens. Inadequate financing, even if not resulting in failure of service, may result in inadequate maintenance of these intrastate facilities thereby posing potential safety threats to those living and working at or near plaintiffs' facilities. The mere fact that plaintiffs sell natural gas in interstate commerce, or contract for its storage solely with out-of-state customers, does not render the state powerless to regulate any of their activities where local public interests such as those listed above are served by the regulation.

The next inquiry under *Bruce Church* involves the nature of the state regulation and the degree to which it burdens interstate commerce. Act 144's applicability is limited to long-term offerings, specifically exempting short-term borrowings from MPSC approval under Act 144.[15] Accordingly, plaintiffs may issue notes payable at periods of 24 months or less without securing MPSC approval, and may do so pending action on an application for a long-term securities issuance. This option minimizes if not altogether eliminates potential impairment of plaintiffs' ability to raise necessary capital.

The authority of the MPSC under Act 144 is expressly limited to ascertaining whether the funds derived from the issue are to be applied to lawful purposes and whether the issue and amount are essential to the successful accomplishment of the purpose, or that the issue fairly represents accumulated and undistributed earnings invested in capital assets and not previously capitalized. Once the MPSC has satisfied itself to such effect, it must authorize the issuance.[16] Although the MPSC

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[15] M.C.L.A. 460.301(4), M.S.A. 22.101(4), provides, in pertinent part:

> "A . . . corporation . . . may issue notes for lawful purposes, payable at periods of not more than 24 months, without authority from the commission . . ."

[16] M.C.L.A. 460.301(3), M.S.A. 22.101(3), provides, in pertinent part:

> "If from the application filed and other information obtained from the investigation authorized in this act the commission is satisfied that the funds derived from the issue of stocks, bonds, or notes are to be applied to lawful purposes and that the issue and amount is essential to the successful carrying out of the purposes, or that the issue of the stock fairly represents accumulated and undistributed earnings invested in capital assets and not previously capitalized, the commission shall grant authority to make the issue. In granting the authority, the commission may impose as a condition of the grant reasonable terms and conditions that the commission considers proper." (Emphasis added.)

has discretion to impose reasonable terms and conditions on the grant of authority,[17] every application of plaintiffs since 1979 has received unconditional approval from the MPSC. Further, I am satisfied that defendants' discretion under Act 144 is sufficiently circumscribed so as to minimize, if not eliminate, the likelihood of arbitrary decisions based on purely parochial concerns. Act 144 appears to regulate evenhandedly. Any burden imposed on interstate commerce is equally imposed on intrastate commerce.

As previously discussed, the average delay beyond the automatic 20 day effective period for registration statements under federal Act 133 is approximately three weeks or less, according to plaintiffs' history of applications before the MPSC. No evidence has been presented that any FERC certification or rate proceeding has ever been disrupted or affected by defendants' proceedings under Act 144. Neither have plaintiffs presented any evidence that the average three week delays in securing MPSC approval on their applications have ever adversely affected either the cost or the overall marketability of any of plaintiffs' securities issues.

What the record reveals is an evenhanded and relatively limited state regulation which, as applied to plaintiffs, has historically had an indirect and minimal effect on interstate commerce. In light of the legitimate local public interests previously identified, this is not a regulation which violates Commerce Clause principles under the *Bruce Church* analysis.

Plaintiffs next argue that the regulation must be invalidated on a "uniformity" analysis. State regulation of interstate commerce has been held constitutionally impermissible where the subject matter requires national uniformity for that commerce to function. *Morgan v. Commonwealth*, 328 U.S. 373, 377 (1946). Plaintiffs claim that national uniformity in regulation of natural gas company securities issues is necessary because

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[17] *Id.*

of potentially conflicting multi-state regulation and the potential disruptive effect if every state in which plaintiffs conducted business adopted regulations similar to Act 144. Although there are various state supreme court cases supporting this position, those cases involve challenges to similar state statutes as applied to companies with minimal local interests compared to those of plaintiffs in this case.

In *United Air Lines*, Inc. *v. Nebraska State Railway Commission*, 172 Neb. 784, 112 N.W.2d 414 (1961), and *United Air Lines, Inc. v. Illinois Commerce Comm'n.*, 32 Ill.2d 516, 207 N.E.2d 433 (1965), two of the cases relied upon by plaintiffs, minimal percentages (.45% and .90–1.36%, respectively) of United's overall route miles where within the borders of Nebraska and Illinois. Less than 1% of United's property was located in Nebraska, and although United, a Delaware corporation, had its executive offices in Illinois, its central operating base and chief overhaul bases were located in other states. As of 1965, United's interstate system served 32 states, the District of Columbia, and Canada, and 80% of its operations were interstate. In *Panhandle Eastern Pipeline v. Public Util. Comm'n.*, 56 Ohio St.2d 334, 383 N.E.2d 1163 (1978), Panhandle, a Delaware corporation, purchased, transported and sold natural gas in interstate commerce. Less than .35% of its overall gas sales by volume were accounted for in Ohio and 4.9% of its transmission pipeline was located in Ohio. In *Western Union Telegraph Company v. Public Service Comm'n.*, 127 Mich. App. 88, 338 N.W.2d 731 (1983), Western Union, a Delaware corporation with principal offices in New Jersey, derived only 5 to 7% of its revenues from intrastate operations and only 1.8% of its plant investment was located in Michigan. Western Union's interstate system served all 50 states. The *Western Union* court, although conceding that Act 144's underlying interests were substantial, found, as applied to the case before it, that those local interests were only "incidentally involved, if involved at all." Similar "as applied" analyses

form the basis for the findings in the *United* and *Panhandle* cases. In each instance, the nature and percentage of the companies' business in the forum state was minimal enough so that, when balanced against the adverse effects to interstate commerce, the states' interests justifiably lost out.

By contrast, the local interests in the case at bar cannot be characterized as "only incidentally involved." One hundred percent of Storage Company's physical plant investment is located in Michigan, and it is a Michigan corporation. Over 72% of the gas Pipeline Company sold during 1983 went to its three largest customers, MCGC, Wisconsin Gas Company and Wisconsin Natural Gas Company. Over 50% of Pipeline Company's 1983 sales were in Michigan, approximately 45% in Wisconsin and less than 5% in other states. As of 1983, Pipeline Company had plant investments in 17 states, including Michigan. The net plant investment in Michigan was $309,491,427.00. Louisiana, the state with the next highest plant investment, showed a comparative net investment of only $160,776,399.00. Only federal waters contain a net plant investment ($241,455,320.00) anywhere near the size of that located in Michigan.[18] As to Storage Company, no other state has any interest which would justify regulation. As to Pipeline Company, only Wisconsin has interests approaching those of Michigan. Plaintiffs have, accordingly, failed to convince me that national uniformity in the regulation of natural gas company securities issues is necessary, on the record before me, to avoid a potentially chaotic situation due to multi-state regulation.

Finally, plaintiffs have also failed to convince me that application of Act 144 to plaintiff companies otherwise so materially and unreasonably burdens interstate commerce as to be invalid under the Commerce Clause of the U.S. Constitution. As I have already indicated, substantial, legitimate state interests are served by Act 144 regulation. Act 144 regulates

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[18] See Appendix to Stipulation of Facts, Tab No. 7.

evenhandedly. It does not favor local commerce over out-of-state commerce, and imposes no burden on interstate commerce that it does not also impose on intrastate commerce. The record satisfies me that its effects on interstate commerce are not clearly excessive in relation to the putative local benefits served by regulation. In short, this statutory scheme cannot be said to impose an impermissible burden on interstate commerce.

III. CONCLUSION

For the reasons stated above, I hold that Act 144 regulation of plaintiffs' securities issuances is not preempted by federal law and does not violate the Commerce Clause of the United States Constitution.

/s/ Douglas W. Hillman

Douglas W. Hillman
District Judge

Dated: August 22, 1985

ISSUANCE OF SECURITIES

Act 144, 1909, p 307; eff September 1.

(Title amended by Pub Acts 1915, No. 259, eff August 24.)

AN ACT to regulate the issuance of stocks, bonds and other evidences of indebtedness by persons, corporations and associations owning, conducting or operating certain public utilities, and to provide a penalty for the violation thereof.

The People of the State of Michigan enact:

§ 22.101 Public utility securities; approval by commission; opinion, contents; approval as not presuming inclusion of projects or property in rate base.] SEC. 1. (1) A person, corporation, or association, or a lessee or trustee of a corporation or association, except a municipal corporation or the owner of a renewable resource power production facility as provided in section 1a, organized or authorized to do business under the laws of this state, owning, conducting, managing, operating, or controlling a plant or equipment within this state used wholly or in part in the business of transmitting messages by telephone or telegraph, producing or furnishing heat, artificial gas, light, water, or mechanical power to the public, directly or indirectly, a railroad, interurban railroad, or other common carrier, or a corporation, association, or individual exercising or claiming the right to carry or transport natural gas for public use, directly or indirectly, or petroleum oil by or through a pipeline or engaged in the business of piping or transporting natural gas for public use, directly or indirectly, or engaged in the business of purchasing natural gas for distribution may issue stocks, bonds, notes, or other evidences of indebtedness payable at periods of more than 12 months after the date of issuance, if necessary for the acquisition of property, the construction, completion, extension, or improvement of facilities or for the improvement or maintenance of service or for the discharge or lawful refunding of obligations and may issue stock to represent accumulated earnings

invested in capital assets and not previously capitalized, if the Michigan public service commission issues an order authorizing the issue and the amount of the issue, and states that in the opinion of the commission the use of the capital or property to be acquired to be secured by the issue of the stock, bonds, notes or other evidences of indebtedness, is reasonably required for the purposes of the person, corporation, or association, or that the issue of the stock fairly represents accumulated and undistributed earnings invested in capital assets and not previously capitalized. Approval of securities does not presume that the projects to be constructed or property to be acquired will be included in the company's rate base.

Application; investigation; intervention in proceedings; appraisal of property, expenses; payment; deposit of funds; failure to pay expenses, effect; manner of payment.] (2) A person, corporation, or association desiring authority to issue stocks, bonds, notes, or other evidences of indebtedness shall make written application to the commission in the form as the commission requires. After receiving the application, the commission, for the purpose of determining whether the commission should grant the authority, may make an inquiry or investigation, hold hearings, and examine witnesses, books, papers, documents, or contracts the commission considers of importance in enabling it to reach a determination. An interested person, including municipalities and organizations whose membership consists of a substantial number of ratepayers within the service area of the utility, shall have the right to intervene as provided in the rules of the commission. If the applicant fails, neglects, or refuses to furnish the information required by the commission, or if the commission directs, an appraisal of the property of the applicant shall be made by a disinterested person to be appointed by the commission and whose compensation shall be fixed by the commission. The entire expense of making the appraisal shall be borne by the applicant. After the

appraisal is made and filed with the commission and before any action is taken by the commission upon the application, the expenses of the appraisal as determined by the commission shall be paid by the applicant to the commission, which shall deposit the amount in the treasury of the state to be credited to the general fund, taking the receipt of the treasurer for the deposit and filing the receipt in the commission's office with the application. If the applicant refuses or neglects to pay the expense of the appraisal, the commission shall dismiss the application and the commission may bring an action against the applicant in a court of competent jurisdiction in this state for the recovery of the expense of the appraisal. The expense of the appraisal shall be paid by the state treasurer to the person certified by the commission to be entitled to the appraisal fee.

Grant of authority to issue securities; conditions, imposition.] (3) If from the application filed and other information obtained from the investigation authorized in this act the commission is satisfied that the funds derived from the issue of stocks, bonds, or notes are to be applied to lawful purposes and that the issue and amount is essential to the successful carrying out of the purposes, or that the issue of the stock fairly represents accumulated and undistributed earnings invested in capital assets and not previously capitalized, the commission shall grant authority to make the issue. In granting the authority, the commission may impose as a condition of the grant reasonable terms and conditions that the commission considers proper.

Notes; issuance without authority; conditions.] (4) A person, corporation, or association may issue notes for lawful purposes, payable at periods of not more than 24 months, without authority from the commission; but the notes shall not in whole or in part, be refunded by an issue of stock or bonds or by an evidence of indebtedness running for more than 12 months without the consent of the commission.

Applicability of act.] (5) This act shall apply to stock, shares, bonds, or notes issued to or taken by the incorporators or their agents, assigns, or trustees of a corporation or association in the first instance, and shall also apply to stock, bonds, or notes issued to or taken by the stockholders of the corporation or association, their agents, assigns, or trustees, after the first instance.

Supreme court review of commission determination; pendency of appeal as not operating to stay proceedings.] (6) The supreme court upon petition of a person aggrieved may review by certiorari a final order of determination of the commission. The pendency of an appeal shall not, however, unless specifically ordered by the reviewing court, operate as a stay of proceedings.

Issuance of securities; binding effect notwithstanding subsequent decisions.] (7) Stocks, bonds, notes, or other evidences of indebtedness issued pursuant to an order of the commission shall be binding in accordance with their terms notwithstanding that the order of the commission is later vacated, modified, or otherwise held to be invalid in whole or in part, unless either of the following occurred:

(a) Operation of the order of the commission has been stayed or suspended by the reviewing court before issuance, which issuance shall not precede the expiration of 30 days following the date of the final order of the commission.

(b) The stocks or bonds were issued pursuant to an underwritten public offering and registered under title I of the securities act of 1933, 15 USC 77a to 77aa, by an electric utility with a total property value of not less than $1,000,000,000.00 in this state and the commission has authorized their issuance without conducting a hearing pursuant to subsection (2).

Nonapplicability of act.] (8) This act shall not apply to a person, corporation, or association which is engaged in the business of carrying, transporting, piping, purchasing for distribution, or selling natural gas into this state, which derives less than 5% of its consolidated gross revenues from all of its operations from natural gas operations in this state, and which does not offer residential natural gas service to the general public under rules promulgated by the Michigan public service commission. (MCL § 460.301; CL '29, § 11077; CL '15, § 8161.)

[NOTE: EMPHASIZED SECTION HEADINGS ADDED BY STATUTE BOOK PUBLISHER]

UNITED STATES CONSTITUTIONAL PROVISIONS

Art I, Section 8, Clause 3. Regulation of Commerce.

(The Congress shall have power. . .) "to regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes;"

Art VI, Clause 2. Supreme Law of Land.

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

FEDERAL STATUTES

Natural Gas Act, 15 USC 717 et seq.:

Section 1(b), 15 USC 717(b).

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 2(6), 15 USC 717a(6).

When used in this chapter, unless the context otherwise requires —

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

Section 7(c), 15 USC 717f(c).

(c)(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for

which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of —

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

Section 7(e), 15 USC 717f(e).

(e) Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

Securities Act of 1933; 15 USC 77a et seq.:

Section 18, 15 USC 77r.

Nothing in this subchapter shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or

the District of Columbia, over any security or any person.

Public Utility Company Holding Company Act of 1935, 15 USC 79 et seq.:

Section (a) and (b), 15 USC 79f(a) and (b).

Issuing, selling, or altering rights of stockholders to declaration

(a) Except in accordance with a declaration effective under section 79g of this title and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security of such company.

Exemptions from operation of subsection (a):

(b) The provisions of subsection (a) of this section shall not apply to the issue, renewal, or guaranty by a registered holding company or subsidiary company thereof of a note or draft (including the pledge of any security as collateral therefor) if such note or draft (1) is not part of a public offering, (2) matures or is renewed for not more than nine months, exclusive of days of grace, after the date of such issue, renewal, or guaranty thereof, and (3) aggregates (together with all other than outstanding notes and drafts of a maturity of nine months or less, exclusive of days of grace, as to which such company is primarily or secondarily liable) not more than 5 per centum of the principal amount and par value of the other securities of such company then outstanding, or such greater per centum thereof as the Commission upon application may by order

authorize as necessary or appropriate in the public interest or for the protection of investors or consumers. In the case of securities having no principal amount or no par value, the value for the purposes of this subsection shall be the fair market value as of the date of issue. The Commission by rules and regulations or order, subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers, shall exempt from the provisions of subsection (a) of this section the issue or sale of any security by any subsidiary company of a registered holding company, if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company and have been expressly authorized by the State commission of the State in which such subsidiary company is organized and doing business, or if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company when such subsidiary company is not a holding company, a public-utility company, an investment company, or a fiscal or financing agency of a holding company, a public utility company, or an investment company. The provisions of subsection (a) of this section shall not apply to the issue, by a registered holding company or subsidiary company thereof, of a security issued pursuant to the terms of any security outstanding on January 1, 1935, giving the holder of such outstanding security the right to convert such outstanding security into another security of the same issuer or of another person, or giving the right to subscribe to another security of the same issuer or another issuer. Within ten days after any issue, sale, renewal, or guaranty exempted from the application of subsection (a) of this section by or under authority of this subsection, such holding company or subsidiary company thereof shall file with the Commission a certificate of notification in such form and setting forth such of the information required in a declaration under section 79g of this title as the Commission may be rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

Section 7g(g), 15 USC 79g(g).

(g) If a State commission or State securities commission, having jurisdiction over any of the acts enumerated in subsection (a) of section 79f of this title, shall inform the Commission, upon request by the Commission for an opinion or otherwise, that State laws applicable to the act in question have not been complied with, the Commission shall not permit a declaration regarding the act in question to become effective until and unless the Commission is satisfied that such compliance has been effected.

Section 10j(f), Section 79j(f).

(f) The Commission shall not approve any acquisition as to which an application is made under this section unless it appears to the satisfaction of the Commission that such State laws as may apply in respect of such acquisition have been complied with, except where the Commission finds that compliance with such State laws would be detrimental to the carrying out of the provisions of section 79k of this title.

Section 20t(b), 15 USC 79t(b).

(b) In the case of the accounts of any company whose methods of accounting are prescribed under the provisions of any law of the United States or of any State, the rules and regulations or orders of the Commission in respect of accounts shall not be inconsistent with the requirements imposed by such law or any rule or regulation thereunder; nor shall anything in this chapter relieve any public-utility company from the duty to keep the accounts, books, records, or memoranda which may be required to be kept by the law of any State in which it operates or by the State Commission of any such State. But this provision shall not prevent the Commission from imposing such additional requirements regarding reports or accounts as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers.

Section 79u, 15 USC 79u.

Nothing in this chapter shall affect (1) the jurisdiction of the Commission under the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934 over any person, security, or contract, or (2) the rights, obligations, duties, or liabilities of any person under such Acts; nor shall anything in this chapter affect the jurisdiction of any other commission, board, agency, or officer of the United States or of any State or political subdivision of any State, over any person, security, or contract, insofar as such jurisdiction does not conflict with any provision of this chapter or any rule, regulation, or order thereunder.

Federal Power Act, 16 USC 791a et seq.:

Section 19, 16 USC 812.

As a condition of the license, every licensee under this chapter which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee under this chapter or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is conferred upon the commission, upon complaint of any person

aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*. That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

Section 20, 16 USC 813.

When said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties, or such States are unable to agree through their properly constituted authorities on the services to be rendered, or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued

by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in subtitle IV of Title 49 and the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 807 of this title for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this chapter.

Section 204, 16 USC 824c(f).

The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

Section 308, 16 USC 825q.

If, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 [15 U.S.C.A. § 79 eq seq.] or of a rule, regulation, or

order thereunder and to a requirement of this chapter or of a rule, regulation, or order thereunder, the requirement of the Public Utility Holding Company Act of 1935 shall apply to such person, and such person shall not be subject to the requirement of this chapter, or of any rule, regulation, or order thereunder, with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this chapter shall apply to such person.

OPPOSITION

BRIEF

86-986

No. _____

Supreme Court, U.S.
FILED
JAN 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

October Term, 1986

Michigan Public Service Commissioners
Eric J. SCHNEIDEWIND, Edwyna G. ANDERSON
and Matthew E. McLOGAN,
Petitioners,

v.

ANR Pipeline Company and ANR Storage Company,
Respondents.

BRIEF IN OPPOSITION

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DATED: January 9, 1987

QUESTIONS PRESENTED

I

Whether the Natural Gas Act (15 U.S.C. § 717 *et seq.*) preempts a state public utilities statute requiring advance approval of securities issuances by "natural gas companies" which conduct no local utility business.

II

Whether the Michigan Public Utilities Securities Act, 1909 P.A. 144, M.C.L. 460.301 *et seq.*, violates the Commerce Clause of the United States Constitution as applied to "natural gas companies" which conduct no local utility business.

PARTIES

The parties before the United States Court of Appeals for the Sixth Circuit were:

ANR Pipeline Company and ANR Storage Company, *plaintiffs/appellants*

Michigan Public Service Commissioners (former Michigan Public Service Commission Chairman, Eric J. Schneidewind, and Commissioners Edwyna G. Anderson and Matthew E. McLogan, in their official capacities), *defendant/appellees.*

The Coastal Corporation, a publicly owned corporation, owns 100% of Colorado Interstate Corporation, which owns 100% of American Natural Resources Company and ANR Storage Company.

The Coastal Corporation's subsidiaries and affiliates which are not wholly-owned are as follows: Canyon Creek Compression Company; Overthrust Pipeline Company; Geogas Enterprise, S.A.; Jayhawk Pipeline Company; Great Lakes Gas Transmission Company; Erie Pipeline System; Mobile Bay Pipeline Company; ANR-TransCanada Energy Company; Southwest Gas Storage Company; Washington 28 Gas Storage Company; Capital District Energy Center Cogeneration Associates; and High Island Offshore System.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case completely ignores the most important factual point established by the record; *i.e.*, that both Respondents operate in Michigan *exclusively* as "natural gas companies", as that term is used in the Natural Gas Act, and are comprehensively regulated by the Federal Energy Regulatory Commission ("FERC"). The Michigan Public Service Commission does not exercise general regulatory jurisdiction over the Respondents themselves or over any part of their respective facilities or operations. Neither Respondent carries on one iota of local utility operations in Michigan which would be subject to the State's broad regulatory jurisdiction over public utilities providing intrastate service to its citizens.

Furthermore, although Petitioners do acknowledge that the Court of Appeals' determination was limited to declaring Act 144 unconstitutional as applied to these particular Respondents, they fail to give proper emphasis to this important limitation on the Court of Appeals' decision. Moreover, Petitioners completely fail to mention that the Court of Appeals' decision is confined to the type of "advance approval" securities regulation embodied in Act 144.[1] No other type of securities regulation by a state was before the Court of Appeals and, consequently, the validity of any such regulation is unaffected by this case.

In one respect, Petitioners' statement of the case is simply wrong. They contend (Petition, p. 4) that ANR Storage Company ("Storage") "does not engage in any interstate transportation or

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[1] It is important to note (a) that whereas typical state "blue-sky" securities regulation requires registration prior to offers or sales of securities within the regulating states, Act 144 purports to require Respondents to obtain Michigan Public Service Commission approval before they may offer or sell stock or long-term debt securities anywhere, and (b) that Respondents use national and international financial markets to issue and sell their securities (SF-26).

sale of gas." This is factually and legally incorrect, as evidenced by Petitioners' own admission that the FERC exercises jurisdiction over Storage Company and its facilities and operations pursuant to the Natural Gas Act, which grants FERC jurisdiction solely over persons engaged in the "transportation (or sale) or natural gas in interstate commerce." Moreover, gas storage is a necessary aspect of the jurisdictional transportation process itself. [2]

[2] The Sixth Circuit Court of Appeals has expressly recognized that gas storage is an integral part of the interstate transportation of natural gas in a case dealing with the scope of FERC's certification authority. *See, Columbia Gas Transmission Corp.* v. *An Exclusive Gas Storage Easement*, 776 F.2d 125, 129 (6th Cir. 1985).

ARGUMENT

I

The Court of Appeals Correctly Applied the Appropriate Constitutional Analysis

A. The Court of Appeals Correctly Found Act 144 Preempted as to Respondents

The Court of Appeals clearly applied the proper tests for determining whether or not a congressional enactment preempts state law. Citing *Fidelity Federal Savings & Loan Association* v. *De la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed. 2d 664 (1982), the Court below properly recognized that:

> "Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in it structure and purpose' *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because '[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.' *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified

> to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility.' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963) or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)." (458 U.S. at 152-153).

ANR Pipeline Company v. *Schneidewind*, 801 F.2d 228 (6th Cir. 1986). *See also, Louisiana Public Service Commission* v. *FCC*, 476 U.S. _____, 106 S.Ct. 1890, 90 L.Ed. 2d 369, 381-382 (1986).

Since Petitioners could not legitimately argue that the Court of Appeals applied improper preemption analysis, they contend only that the Court's application of the appropriate tests was unsupported by the stipulated facts and record of the case. This assertion typifies Petitioners' myopic view of the facts herein, for they constantly attach undue emphasis to one fact and ignore related, complementary facts when constructing their positions.

An example of this behavior is Petitioners' seeming fascination with the quantity of Respondents' property and operations located in Michigan. According to Petitioners, it would appear that only the quantity of property located, or business operations taking place, in a given state is relevant to preemption analysis, and not the nature or character of the business actually being conducted. Both the Court of Appeals and the District Court recognized, however, that Respondents conduct business in Michigan only as "natural gas companies". Both Respondents, as well as 100% of their respective operations and facilities in Michigan, are comprehensively regulated by the FERC. Petitioners themselves stipulated [3] that neither Respondent conducts any local utility

[3] As noted by Petitioners (Petition, p. 3), this case has been decided based wholly upon an agreed record and stipulated facts.

operations in Michigan by, for example, selling natural gas to end users. In light of these facts, the substantial Michigan "presence" of Respondents is simply immaterial to this preemption analysis.

Petitioners also make the alternative claim that the Court of Appeals erred in allegedly accepting Respondent's thesis "that this case involves attempted state regulation of interstate gas transportation or sales" (Petition, pages 5-6). Here, Petitioners completely misrepresent the basis for the Court of Appeals' decision. What the Court of Appeals correctly recognized is that the Natural Gas Act not only gives the FERC jurisdiction over the interstate transportation of natural gas and wholesale sales of natural gas for resale, but also embodies a scheme of comprehensive regulation of the "natural gas companies" themselves. 15 U.S.C. § 717(b). The Court of Appeals simply utilized all of the language of the federal statute, and all of the agreed record in conducting its preemption analysis, rather than those parts of the statute and record that Petitioners wished it to utilize. This cannot possibly constitute reversible error.

A third supposed "error" identified by Petitioners is the Court of Appeals' claimed disregard for the legislative history of the Natural Gas Act. Clearly, it is true that one congressional purpose in passing the Natural Gas Act was to fill "regulatory gaps" created when this Court struck down initial state attempts at regulating interstate commerce in the natural gas industry. However, that purpose plainly is not inconsistent with attaching some preemptive effect to the Natural Gas Act. *See, e.g., Transcontinental Gas Pipeline Corp.* v. *State Oil and Gas Board of Mississippi*, 474 U.S. _____, 106 S.Ct. 709, 88 L.Ed. 2d 732, *reh'g den.* 106 S. Ct. 1485 (1986) (wherein this Court held the Natural Gas Act to have preemptive effect in a different context). In the instant case, the Court of Appeals further recognized that Congress enacted the Natural Gas Act in an attempt to achieve uniformity of regulation in this area, and that the prospect of state interference with FERC's efforts to accom-

plish this objective cannot be tolerated under the Supremacy Clause.

Petitioners also attempt to portray the Court of Appeals' decision as one which conflicts with prior decisions of this Court. In doing so, they refer to Act 144 as mere "securities regulation", resulting in an unspoken innuendo that Act 144 is only a variant of the states' ubiquitous "blue-sky" regulation, and thus *prima facie* valid under numerous holdings of this Court. However, this argument simply does not wash.

There is no question that states are generally empowered to regulate the process in which securities are locally distributed. There is also no question that there are limits on the states' ability to intrude upon an area subject to comprehensive federal regulation, under the guise of "regulating securities". Where, as here, Michigan purports to require advance approval of securities issuances by a "natural gas company" which is already subject to federal regulation of 100% of its Michigan operations and facilities, and where Michigan's regulation undoubtedly has the potential to obstruct major business decisions made by that "natural gas company"[4], the line between mere "securities regulation" and impermissible interference with a federal regulatory scheme has undoubtedly been crossed.

Petitioners have cited no decision of this Court holding that "advance approval" securities regulation by a state, as applied to a business whose entire operation in that state is subject to comprehensive federal regulation, is constitutionally permissible. Petitioners ask this Court to disregard the very nature of "advance approval" securities regulation, which numerous courts have

[4] In addition, and as noted at p. 16 of the Court of Appeals' earlier decision herein (Petition, p. A-16), Michigan's Act 144 regulation undoubtedly has great potential for conflict with FERC orders issued pursuant to the FERC's general regulatory jurisdiction over both Respondents.

recognized is fundamentally different from traditional disclosure-based securities regulation. *See, e.g., State Utilities Commission* v. *Southern Bell Telephone and Telegraph Co.*, 288 N.C. 201, 217 S.E. 2d 543, 551 (1974); *United Air Lines* v. *Illinois Commerce Commission*, 32 Ill.2d 516, 207 N.E. 2d 433 (1965). The Court of Appeals correctly refused to ignore the far more burdensome nature of the "advance approval" type of regulation, and the distinction so drawn is clearly not inconsistent with this Court's prior decisions.

Petitioners also assert that the Court of Appeals erred in basing its preemption decision on "the 'possibility of conflict' between state and federal regulation." Decisions of this Court amply support preemption on the basis of the "possibility of conflict." *See, e.g., Northern Natural Gas Co.* v. *State Corp. Commission of Kansas*, 372 U.S. 84, 92, 83 S.Ct. 646, 9 L.Ed.2d 601, *reh'g den.* 372 U.S. 960 (1963); *Maryland* v. *Louisiana*, 451 U.S. 725, 751, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981).

Petitioners' failure to recognize the materiality of Respondents' status as "natural gas companies" with exclusively FERC-regulated operations, and the significant differences between "advance approval" regulation of securities and disclosure-based regulatory schemes, does not make the Court of Appeals decision incorrect. Neither does Petitioners' continued unfounded belief, that Respondents are no different from any local Michigan public utility, warrant a grant of *certiorari* in this case. The Court of Appeals correctly applied the appropriate form of preemption analysis to the stipulated facts herein, and further judicial review is wholly unnecessary.

B. The Court of Appeals Correctly Found Act 144 an Unconstitutional Burden on Interstate Commerce, as Applied to Respondents

As was true of the Court of Appeals' analysis of preemption, its inquiry into Act 144's constitutionality on Commerce Clause

grounds was conducted pursuant to standards established by this Court in numerous decisions of recent vintage. In fact, the Court of Appeals applied one of the Court's most recent formulations of the test for constitutionality under the Commerce Clause, being that found in *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. _____, 106 S.Ct. 2080, 90 L.Ed. 2d. 552 (1986).

Using *Brown-Forman* analysis, the Court of Appeals first found that Act 144 directly regulates interstate commerce, since "advance approval" regulation inherently contemplates that such approval may not be given, and that Respondents' securities are generally sold in both national and international securities markets. A finding of economic protectionism as a motive is not required in order for a statute to be struck down as a direct regulation of interstate commerce. See, e.g. *Edgar* v. *Mite Corporation*, 457 U.S. 624, 640, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982). In fact, *Brown-Forman* itself used the disjunctive when setting forth the test for *per se* invalidity under the Commerce Clause, stating that "when a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state over out-of-state economic interests, we have generally struck down the statute without further inquiry."

Nevertheless, the Court of Appeals also engaged in exactly the balancing inquiry generally required when undertaking a constitutional analysis of indirect state regulations of interstate commerce, under the reasoning of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed. 2d 174 (1970). Having done so, the Court of Appeals correctly found that the application of Act 144 to Respondents unduly burdens interstate commerce since important federal interests substantially outweigh Michigan's insignificant, or nonexistent, legitimate local objectives.

Petitioners' attack on the Court of Appeals' balancing of interests is once again premised on their misguided refusal to recognize the overriding importance of Respondents' status as

FERC-regulated "natural gas companies" which engage in absolutely no local utility business in Michigan. Petitioners refer the Court to cases that emphasize the deference ordinarily accorded state laws regulating public utilities. However, in each of these cases, the utilities being regulated provided local public utility service to citizens of the state imposing the regulation. By contrast, not one iota of Respondents' operations is regulated by the Michigan Public Service Commission in any manner (other than with respect to their securities issuances prior to the Court of Appeals' decision in this case). Therefore, the traditional deference afforded to state public utilities regulation has no application to this case.

The Court of Appeals' application of the *Pike* v. *Bruce Church* balancing test not only takes into account the important federal interest in uniformly regulating natural gas companies and the services they provide, but also properly recognizes the various limitations which this Court's decisions have imposed on the type of local interest which can be considered "legitimate" in this context. For example, Michigan's interest in preventing over-capitalization, the major purpose advanced by the Petitioners in support of Act 144, is not a "legitimate local interest" in regulating the securities issuances of a "natural gas company". This Court has declared that FERC, not the states, shall regulate natural gas companies for the purpose of assuring "confidence in the financial integrity of the enterprise." *FPC* v. *Memphis Light, Gas and Water*, 411 U.S. 458, 466, 93 S.Ct. 1723, 36 L.Ed.2d 426 (1973).

Furthermore, the Court has held that a state regulation's impact must be "predominantly local". *Morgan* v. *Commonwealth of Virginia*, 328 U.S. 373, 378, 66 S.Ct. 1050, 90 L.Ed. 1317 (1946). Since the Respondents' securities issuances occur exclusively in national and international markets, the impact of state regulation on the investor/creditor is predominantly national rather than local. Therefore, Michigan's interest in protecting

investors and creditors is not a "legitimate local interest" such as should be included in the balance against the clear and direct burden imposed on interstate commerce by application of Act 144 to Respondents.

The remaining challenge which Petitioners present to the Court of Appeals' application of the *Bruce Church* test involves the weight assigned by the Court of Appeals to Act 144's burdensome effect on interstate commerce. In this regard, it can only be said that the Court of Appeals properly recognized that "advance approval" securities regulation inherently contains the possibility that approval may not be given, and the importance of long-term securities to the capital intensive business conducted by both Respondents. In sum, the Court of Appeals was clearly correct in concluding that the significant burdens which the application of Act 144 to these Respondents imposes on interstate commerce outweigh the vaguely defined and insubstantial state interests alleged to justify same.

II

The Court of Appeals' Decision Creates No Conflict With the Michigan Supreme Court's Decisions

Petitioners argue that the Court of Appeals' unanimous decision in this case is in conflict with two relatively recent decisions of the Michigan Supreme Court, thereby warranting a grant of *certiorari*. Petitioners are clearly wrong in this regard because no conflict of principles or analysis exists between the decision in this case and the 1979 decisions of the Michigan Supreme Court in *Michigan Gas Storage Co.* v. *MPSC*, 405 Mich. 376; 275 N.W. 2d 457 (1979) and *Indiana & Michigan Power Co.* v. *MPSC*, 405 Mich. 400; 275 N.W. 2d 450 (1979). Both of these Michigan decisions are factually distinguishable from the case at bar.

In the *Michigan Gas Storage* case, the regulated company had facilities only in Michigan and all of the gas stored by the company

was consumed in Michigan. In short, no other state had any right to regulate Michigan Gas Storage Company and no other state was impacted in any way by its operations. Moreover, the Hinshaw Amendment to the Natural Gas Act expressly declares the operations of such a company (i.e., one as to which all of its stored gas is consumed in Michigan) to be "primarily a local concern" and "subject to regulation by the several states." 15 U.S.C. §717(c).

The *Indiana & Michigan Power Company* case did not even involve the Natural Gas Act, and thus Petitioner's claim that it is directly contradicted by the Court of Appeals' decision herein can only be regarded as specious nonsense.

The decision of the Court of Appeals herein is fully consistent with decisions of the highest state courts in Illinois, Ohio and Nebraska, which have each struck down state advance approval securities regulation of companies that are predominantly, but not exclusively, engaged in interstate commerce. *See, Natural Gas Pipeline Co.* v. *Illinois Commerce Commission*, 33 Ill.2d 214, 210 N.E.2d 490 (1965); *United Air Lines, Inc.* v. *Illinois Commerce Commission*, 32 Ill.2d 516, 207 N.E.2d 433 (1965); *United Air Lines, Inc.* v. *Nebraska State Railway Commission*, 172 Neb. 784, 112 N.W.2d 414 (1961); *Panhandle Eastern Pipe Line Co.* v. *Public Utilities Commission*, 56 Ohio St.2d 334, 383, N.E. 2d 1163 (1978).

For the reasons set forth above, a grant of *certiorari* by this Court is not necessary to resolve a conflict between the Sixth Circuit Court of Appeals and the highest court of any state.

III

The Issues Sought to be Reviewed Lack National Significance, and Are Important Only to the Parties

Petitioners contend that "if Act 144 is unconstitutional as

applied to Respondents herein under these facts, then it is difficult to imagine how any state utilities securities act could be constitutional whenever it is applied to any company which can claim contact with interstate commerce or with some aspect of federal regulation." (Petition, p. 22). They go on to argue that if the Court of Appeals' decision is allowed to stand, the judicial deregulation in securities will occur on a nationwide basis. (Petition, pp. 22-23). Neither of these unsupported assertions is correct.

As emphasized throughout this Brief, the Court of Appeals' decision is limited in some very important respects. First, both Respondents herein conduct their natural gas transportation, storage and sale activities exclusively as FERC-regulated natural gas companies conducting no local public utility business in Michigan. Thus, local public utility companies properly within the ambit of state regulation in the public interest may, consistent with the Court of Appeals' decision, continue to be subject to "advance approval" securities regulation.

Perhaps even more importantly, the "spectre" which Petitioners raise -- being that of Respondents' issuing their securities completely free of governmental regulation -- is totally unfounded. The only regulation struck down by the Court of Appeals' decision herein is Michigan's "advance approval" regulation of Respondents' securities under Act 144. As noted by the Court of Appeals, Respondents will continue to be subject to regulation by the FERC, which implicitly regulates Respondents' securities issuances when it issues certificates of public convenience and necessity premised in part, upon the detailed financing plans which Respondents are required to submit in connection with each application. Moreover, Respondents (and all other security issuers) will continue to be required to issue their securities in compliance with the extensive federal and state disclosure-oriented securities regulatory schemes. Accordingly, it is difficult to understand Petitioners' characterization of the Court of Appeals' decision in this case as accomplishing a nationwide judicial deregulation of securities.

Petitioners' attempt to overstate the breadth of the Court of Appeals' decision, like their attempts to misstate the factual and legal basis of that decision, should not result in this Court granting the requested writ of *certiorari*. Application of the Court of Appeals' decision is necessarily constrained by the rather unusual facts of this case. There is, therefore, no compelling public interest in receiving a pronouncement from this Court on the issues raised in the Petition.

CONCLUSION

For the reasons stated herein, Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit filed by Petitioners Eric J. Schneidewind, Edwyna G. Anderson and Matthew E. McLogan, Michigan Public Service Commissioners.

Respectfully submitted,

MIKA, MEYERS, BECKETT & JONES

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JOINT

APPENDIX

No. 86-986 (3)

Supreme Court, U.S.
FILED
APR 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

October Term, 1986

MICHIGAN PUBLIC SERVICE COMMISSIONERS
Eric J. SCHNEIDEWIND, Edwyna G. ANDERSON
and Matthew E. McLOGAN,
Petitioners,

v

ANR PIPELINE COMPANY AND ANR STORAGE COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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EDITOR'S NOTE

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RELEVANT DOCKET ENTRIES

United States District Court
Western District of Michigan
Southern Division
Case No. G84-438 CA

ANR Pipeline Company & ANR Storage Company
v. Schneidewind, et. al.

Date	No.	Filings/Proceedings
4/25/84	1	Filed Complaint for Declaratory Judgment; Summons issued and returned to Plaintiffs' representative
5/17/84	3	Filed Motion to Dismiss with Brief in Support; Notice of Hearing set for 6/11/84 at 9:00 a.m. in Grand Rapids, Michigan; Proof of Service
5/21/84	4	Filed Plaintiffs' Motion for Leave to File an Amended Complaint and Add Additional Parties Defendant with proposed Amended Complaint
9/7/84	12	File Opinion re: Motion to Dismiss and Motion to Amend
9/7/84	13	Filed Order in accordance with Opinion that Plaintiffs' Motion to Amend its Complaint is granted, that Defendants' Motion to Dismiss is granted in part and denied in part; copies sent to Jones and Keskey
9/21/84	15	Filed Amended Complaint for Declaratory Judgment; issued Summons on the Amended Complaint and returned to Plaintiffs' representative
10/16/84	17	Filed Defendants' Answer to Plaintiffs' First Amended Complaint; Proof of Service
10/29/84	19	Filed Defendants' First Interrogatories for Plaintiffs; Proof of Service

Date	No.	Filings/Proceedings
11/1/84	20	Filed Defendants' Second Interrogatories for Plaintiffs; Defendants' First Request for Admissions by Plaintiffs; Proof of Service
11/16/84	21	Filed Plaintiffs' Answer to Defendants' First Request for Admissions; Proof of Service
11/20/84	22	Filed Order that 1) parties shall submit stipulated set of facts by 12/31/84; 2) Plaintiffs' Motion for Summary Judgment and Brief due 1/10/85; 3) Defendants' Reply Brief due 2/1/85; 4) Plaintiffs' Response due 2/7/85; 5) oral argument on summary judgment on 2/11/85 at 9:00 a.m.; copies sent to Jones and Keskey
11/23/84	23	Filed Defendants' Third Interrogatories for Plaintiffs; Proof of Service
12/20/84	24	Filed Defendants' Second Request for Admissions by Plaintiffs; Proof of Service
12/20/84	25	Filed Plaintiffs' Answers to Defendants' First Interrogatories
12/20/84	26	Filed Plaintiffs' Answers to Defendants' Second Interrogatories
12/20/84	27	Filed Plaintiffs' Answers to Defendants' Third Interrogatories
12/20/84	28	Filed Proof of Service for pleadings numbered 25-27
1/15/85	29	Filed Plaintiffs' Reply to Defendants' Second Request for Admissions; Proof of Service

Date	No.	Filings/Proceedings
1/14/85	20	Filed Stipulation of Facts
1/14/85	33	Filed Appendix to Stipulation of Facts dated 1/11/84 (pleading #30)
2/11/85	35	Hearing on oral argument on Plaintiffs' Amended Complaint; request for declaratory relief under advisement
8/22/85	37	Filed Opinion (29)
8/22/85	38	Filed Order in accordance with Opinion that Plaintiffs may not lawfully issue and market their securities without obtaining a prior order of approval from the Michigan Public Service Commission; that Defendants have jurisdiction, power and authority to regulate, approve or disapprove the issuance of marketing of securities by Plaintiffs; and that Plaintiffs' First Amended Complaint for Declaratory Judgment is dismissed with prejudice and that judgment shall be entered for Defendants on both counts of that First Amended Complaint with costs to be taxed; copies sent to Jones, Keskey/Brown and Fishman
8/22/85	39	Filed Judgment
9/19/85	40	Filed Plaintiffs' Notice of Appeal from Judgment entered 8/22/85

United States Court of Appeals
Sixth Circuit
No. 85-1762

ANR Pipeline Company & ANR Storage Company
v. Schneidewind, et. al.

Date	No.	Filings/Proceedings
9/26/85	1	Notice of Appeal filed
9/26/85	2	Certified record filed
10/4/85	8	Transcript Order from court reporter (Reinardy), transcript filed in District Court on 10/2/85 (1 volume)
11/6/85	12	Motion/Appellant: requesting judicial notice (m-11/4)
11/11/85	13	Response/Appellee: in opposition to motion for judicial notice (with Affidavits of Bhatia & Nelson) (m-11/8)
1/16/86	16	Order: denying motion of Appellants to take judicial notice without prejudice to presenting motion to supplement the record on appeal (Jones, J)
1/17/86	16	Joint Appendix: (05) (m-01/16)
2/3/86	18	Citations: updating brief of Appellant (m-01/31) (Papers for the Court)
2/13/86	20	Motion/Appellant: to amend Joint Appendix with attached stipulation (m-02/11)
3/18/86	21	Order: motion to amend Joint Appendix granted; Appellants to file documents as supplemental Joint Appendix by 3/31/86 (4(f))
4/8/86	24	Supplemental Joint Appendix: (05) (m-03/28)

Date	No.	Filings/Proceedings
7/21/86	25	Cause argued by John C. Jones for Appellant, by Don L. Keskey for Appellee (Before: Kennedy, Boggs and Brown, JJ.)
7/24/86	26	Citations: updating brief of Appellee (m-07/22)
9/15/86	27	Judgment: Reversed and Remanded (Kennedy, Boggs and Brown, JJ.) F.P. Opinion, Kennedy, J. (Appellants to recover costs)
10/7/86	28	Mandate, issued (no costs taxed)
1/9/87	29	Supreme Court Notice: Petition for Certiorari filed 12/12/86 (S. Ct. No. 86-986)

STATE OF MICHIGAN
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
— Southern Division

ANR Pipeline Company and ANR Storage Company,

Plaintiffs,

vs.

The Michigan Public Service Commission, Eric J. Schneidewind, Matthew E. McLogan and Edwyna G. Anderson

Defendants.

Case No. 84-438

COMPLAINT FOR DECLARATORY JUDGMENT

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STATE OF MICHIGAN
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
— Southern Division

[CAPTION]

COMPLAINT FOR DECLARATORY JUDGMENT

NOW COME Plaintiffs, by their attorneys, Mika, Meyers, Beckett & Jones, and complain against Defendants by saying:

JURISDICTION AND VENUE

1. Plaintiff ANR Pipeline Company (hereafter "Pipeline Company") is a Delaware corporation, qualified to do business in Michigan as a foreign corporation, having its principal offices in Detroit, Michigan.

2. Plaintiff ANR Storage Company (hereafter "Storage Company") is a Michigan corporation, having its principal office in Detroit, Michigan.

3. Defendant Michigan Public Service Commission (hereafter "MPSC") is an administrative agency of the State of Michigan composed of three members and created by the provisions of 1939 PA 3, as amended (MCLA §460.1, *et seq.*; MSA §22.13(1), *et seq.*), duly constituted as a body politic and having its principal offices and residing in Ingham County, Michigan. Defendant MPSC has certain specific regulatory jurisdiction delegated to it by the Michigan legislature over certain public utility companies operating in the State of Michigan.

4. Defendant Eric J. Schneidewind (in his official capacity) is a member and chairperson, and Defendants Matthew E. McLogan and Edwyna G. Anderson (in their official capacities) are the remaining two members, of the three-person MPSC. Each of these Defendants is a citizen and resident of the State of Michigan, has his or principal official business office in Ingham County, and (in his or her official capacity) is further subject to the jurisdiction of this Court as to both service of process and venue.

5. All actions taken by the Defendant MPSC are in fact the actions of its constituent members, in their official capacities, and all references herein to Defendant MPSC shall be deemed to include each of Defendants Schneidewind, McLogan and Anderson, in their official capacities. [-2-]

6. The claims hereinafter set forth arose in Ingham County, Michigan; and the matter in controversy, in each Count set forth herein, exceeds the sum or value of $10,000.00, exclusive of interest and costs.

7. Jurisdiction in this matter is based upon 28 USC §§1311 and 1337; and venue in this matter is based upon 28 USC §§1391 and 1392.

GENERAL ALLEGATIONS APPLICABLE TO ALL COUNTS

8. Plaintiffs are natural gas companies subject to the jurisdiction of the Federal Energy Regulatory Commission (hereafter "FERC") under the Natural Gas Act (15 USC §717, *et seq.*), which confers on the FERC comprehensive jurisdiction over natural gas companies such as Plaintiffs, including such matters as sales, rates and charges, construction of new facilities and arrangements for financing such construction. The

issuance of securities by Plaintiffs is also subject to the jurisdiction of the Securities Exchange Commission, under the provisions of the Securities Act of 1933 and Securities Exchange Act of 1934 (15 USC §77a, *et seq.*).

9. Pursuant to the provisions of 1909 PA 144, as amended (MCLA §460.301, *et seq.*; MSA §22.101, *et seq.*), the MPSC has been given the jurisdiction and authority to regulate and/or authorize [-3-] the issuance of certain types of securities, including stocks, bonds, notes or other evidences of indebtedness, by certain corporations specifically described in said act, and to charge and collect the statutory fees associated therewith.

10. Section 2 of 1909 PA 144, as amended, being MCLA §460.302 and MSA §22.102, provides that any corporation violating any provision of the act, or failing to perform any duty imposed thereunder, shall be liable to a fine, and Section 3 of said act, being MCLA §460.303 and MSA §22.103, provides that any officer, director, agent or employee of any corporation who shall cause the issuance, or in any way aid in the issuance, of any securities without the prior approval of the MPSC shall be guilty of a felony punishable by imprisonment.

11. Plaintiffs' business operations are dependent upon capital obtained through the issuance of various forms of securities, including stocks, bonds, notes and other evidences of indebtedness, and the successful issuance and sale of such securities is regularly required, and Plaintiffs contend that they are not subject to the jurisdiction of the MPSC under the provisions of 1909 PA 144, as amended, and that they are not required to obtain an order from the MPSC authorizing the issuance of any such securities. [-4-]

12. On the other hand, the MPSC has publicly declared and asserted that it does have jurisdiction over securities issued by Plaintiffs, thus creating an atmosphere of uncertainty and risk relative to any securities which may be issued by

Plaintiffs without an order of approval from the MPSC, with the proximate result being a severe limitation on the marketability of any such securities.

13. The Plaintiffs, and their officers, directors, agents and employees, are greatly concerned about the possibility of being subjected to claims for fines or to felony prosecution in the event Plaintiffs issue securities without prior approval by the MPSC.

14. Plaintiffs are unable to market their securities, either by means of public sale through underwriters or by means of private placements, if there is any uncertainty or risk concerning the validity of those securities. The mere assertion by the MPSC of jurisdiction over Plaintiffs' securities under 1909 PA 144, as amended, creates an atmosphere of uncertainty and risk concerning the validity of Plaintiffs' securities, and Plaintiffs are therefore compelled to secure the MPSC's approval, in spite of said MPSC's lack of any lawful jurisdiction or authority in the matter, and Plaintiffs have been, and will continue to be, forced [-5-] to incur the substantial costs and delays associated with obtaining MPSC approval, unless and until a final judicial determination regarding such lack of jurisdiction has been made.

15. The MPSC, under color of the aforesaid 1909 PA 144, as amended, had subjected Plaintiffs, or caused Plaintiffs to be subjected, to the deprivation of their rights, privileges and immunities secured by the Constitution and laws of the United States, and the MPSC is liable to Plaintiffs in an action at law, or a suit in equity, pursuant to the provisions of 42 USC §1983.

COUNT I

(Pipeline Company)

16. Plaintiff Pipeline Company is engaged primarily in the purchase, transmission, storage and sale of natural gas in interstate commerce.

17. Plaintiff Pipeline Company owns and operates an extensive interstate natural gas transmission system extending from the Anadarko Basin in Oklahoma and Texas, and the onshore Louisiana and offshore Louisiana and Texas natural gas fields to its markets in the midwestern United States, and less than 9% of Pipeline Company's approximately 11,340 miles of pipeline are located in Michigan. A map of Pipeline Company's natural gas transmission system is attached hereto as Exhibit "A"; a schedule [-6-] of total plant investment by major class, as of December 31, 1983, located in or allocated to the State of Michigan and to the other states in which Pipeline Company operates, is attached hereto as Exhibit "B".

18. Pipeline Company conducts its interstate gas pipeline business in 17 different states. Pipeline Company's business operations include the sale, for resale, of all of its gas to gas distribution customers serving markets in the states of Michigan, Wisconsin, Iowa, Illinois, Indiana, Kansas, Missouri, Ohio and Tennessee, and said Plaintiff also transmits its gas through portions of its interstate pipeline system in Louisiana, Oklahoma, Texas, Mississippi, Kentucky, Arkansas and Nebraska. Pipeline Company sells no gas at retail. Pipeline Company also provides other gas transmission and distribution systems with interstate gas transportation and gas storage service in the states of Illinois, Indiana, Iowa, Louisiana, Michigan, Mississippi, Texas and Wisconsin and in federal and state waters of the Gulf of Mexico offshore Louisiana.

19. Uniformity of operation and/or regulation of Pipeline Company's integrated interstate pipeline business is essential

to the effective functioning of such business in interstate commerce, and the potential regulation of Pipeline Company's regular securities issuances by the many states in which said [-7-] Plaintiff's pipeline facilities are located, or in which Pipeline Company is authorized to or is doing business, would disrupt and destroy this essential uniformity, and would result in a multiplicity of fees and administrative proceedings which would be unreasonably expensive, time-consuming and burdensome and disruptive.

20. Plaintiff Pipeline Company is not required to obtain an order from the MPSC authorizing the issuance of its securities, including stocks, bonds, notes or other evidence of indebtedness, pursuant to 1909 PA 144, as amended, for the following reasons:

(a) Application of the aforesaid Michigan statutory provisions to Plaintiff Pipeline Company would so infringe upon the requirement of national uniformity as to materially and unreasonably burden interstate commerce, contrary to the commerce clause of the U.S. Constitution, being USCA Const. Art. 1, §8, cl. 3.

(b) Application of the aforesaid Michigan statutory provisions to Plaintiff Pipeline Company would otherwise so materially and unreasonably burden interstate commerce as to be invalid under the commerce clause of the U.S. Constitution, being Art. 1, §8, cl. 3. [-8-]

(c) The federal regulatory scheme applicable to Plaintiff Pipeline Company has preempted state regulation of Pipeline Company's securities issuances.

21. In view of the foregoing, Plaintiff Pipeline Company needs and requires a determination and declaration by this court that Pipeline Company may lawfully issue and market its securities without obtaining a prior order of approval from the MPSC, and that the MPSC has no jurisdiction or authority in the matter of securities issuances by Pipeline Company.

22. Because of Plaintiff Pipeline Company's dependence upon a regular program of securities issuances, the MPSC possesses the practical ability to severely disrupt and restrict said Plaintiff's ongoing business operations during the pendency of this litigation, and Pipeline Company requires a speedy hearing and determination of the issues involved in its request for declaratory relief herein.

WHEREFORE, Plaintiff Pipeline Company prays for the following relief from this Honorable Court:

(a) Entry of an order advancing this matter on the calendar and providing for a speedy hearing thereon, pursuant to Rule 57 of the Federal Rules of Civil Procedure.

(b) Entry of a declaratory judgment determining and adjudging that Pipeline Company may lawfully issue and market its [-9-] securities without obtaining a prior order of approval from the MPSC, and that the MPSC has no jurisdiction or authority in the matter of securities issuances by Pipeline Company.

(c) Entry of a declaratory judgment that the Defendants Schneidewind, McLogan and Anderson, in their official capacities, are without jurisdiction, power or authority of any kind whatsoever to regulate, approve or disapprove, or otherwise participate in or interfere with, the issuance or marketing of securities by Pipeline Company.

(d) Such other relief as this court determines to be equitable and appropriate under the circumstances.

COUNT II

(Storage Company)

23. Plaintiff Storage Company is engaged in the storage of natural gas in interstate commerce, using a system of natural gas storage facilities located in Michigan.

24. Plaintiff Storage Company's primary business is providing interstate natural gas storage service for various interstate natural gas companies and distribution companies outside of Michigan, whereby Storage Company's customers deliver gas supplies to Storage Company for storage during warm weather and take delivery from Storage Company of this gas during colder weather, [-10-] and this storage service is an integral and essential part of a national interstate pipeline network which enables the ultimate consumer to obtain natural gas in the volumes needed in a temperature sensitive market. A map of this national interstate pipeline network is attached hereto as Exhibit "C", and these customers of Plaintiff include:

United Gas Pipe Line Company
700 Milam
P.O. Box 1478
Houston, Texas 77001

Southern Natural Gas Company
P.O. 2563
Birmingham, Alabama 35202

Mississippi River Transmission Corporation
9900 Clayton Road
St. Louis, Missouri 63124

Panhandle Eastern Pipe Line Company
P.O. Box 1348
Kansas City, Missouri 64141

Northern Indiana Public Service Company
5265 Hohman Avenue
Hammond, Indiana 46320

United Cities Gas Company
1200 Parkway Towers
Nashville, Tennessee 37219

Inter-City Gas Corporation
444 St. Mary Avenue
Winnipeg, Manitoba R3C3T7

25. The development of Plaintiff Storage Company's underground gas storage facilities is regulated by the FERC, and such facilities are certificated to be necessary by the FERC, on [-11-] the basis of public need demonstrated by Storage Company's storage service contracts with its various interstate customers.

26. All of the natural gas stored by Plaintiff Storage Company, as aforesaid, comes from outside the state of Michigan, and all of such gas is subsequently delivered to destinations outside of Michigan upon withdrawal from Storage Company's gas storage facilities.

27. Any disruption or restriction of Storage Company's ability to provide the above-described gas storage service to its various customers will adversely and materially affect interstate commerce and the timely availability of natural gas to the consuming public outside the State of Michigan.

28. The adverse impact upon interstate commerce, resulting from disruption or restriction of Plaintiff Storage Company's ability to provide the aforesaid gas storage service, is material and substantial, while any counter-balancing local concern of the State of Michigan regarding the issuance of stocks, bonds, notes or other evidences of indebtedness by Storage Company is minimal, and Plaintiff Storage Company is not required to obtain an Order from the MPSC authorizing the issuance of its securities, including stocks, bonds, notes or other evidences of indebtedness, pursuant to 1909 PA 144, as amended, for the following reasons: [-12-]

(a) Application of the aforesaid Michigan statutory provisions to Plaintiff Storage Company would so infringe upon the requirement of national uniformity as to materially and unreasonably burden interstate commerce, contrary

to the commerce clause of the U.S. Constitution, being USCA Const. Art. 1, §8, cl. 3.

(b) Application of the aforesaid Michigan statutory provisions to Plaintiff Storage Company would otherwise so materially and unreasonably burden interstate commerce as to be invalid under the commerce clause of the U.S. Constitution, being Art. 1, §8, cl.3.

(c) The federal regulatory scheme applicable to Plaintiff Storage Company has preempted state regulation of Storage Company's securities issuances.

29. In view of the foregoing, Plaintiff Storage Company needs and requires a determination and declaration by this court that Storage Company may lawfully issue and market its securities without obtaining a prior order of approval from the MPSC, and that the MPSC has no jurisdiction or authority in the matter of securities issuances by Storage Company.

30. Because of Plaintiff Storage Company's dependence upon a regular program of securities issuance, Defendant MPSC [-13-] possesses the practical ability to severely disrupt and restrict Storage Company's ongoing business operations during the pendency of this litigation, and Storage Company requires a speedy hearing and determination of the issues involved in its request for declaratory relief herein.

WHEREFORE, Plaintiff Storage Company prays for the following relief from this Honorable Court:

(a) Entry of an order advancing this matter on the calendar and providing for a speedy hearing thereon, pursuant to Rule 57 of the Federal Rules of Civil Procedure.

(b) Entry of a declaratory judgment determining and adjudging that Storage Company may lawfully issue and

market its securities without obtaining a prior order of approval from the MPSC, and that the MPSC has no jurisdiction or authority whatsoever in the matter of securities issuances by Storage Company.

(c) Entry of a declaratory judgment that the Defendants Schneidewind, McLogan and Anderson, in their official capacities, are without jurisdiction, power or authority of any kind whatsoever to regulate, approve or disapprove or otherwise participate in or interfere with, the issuance or marketing of securities by Storage Company. [-14-]

(d) Such other relief as this court determines to be equitable and appropriate under the circumstances.

MIKA, MEYERS, BECKETT & JONES
Attorneys for Plaintiffs

By: /s/ JOHN C. JONES
John C. Jones (P15576)

Business Address:
500 Frey Building
Grand Rapids, MI 49503
(616) 459-3200

Dated:
[-15-]

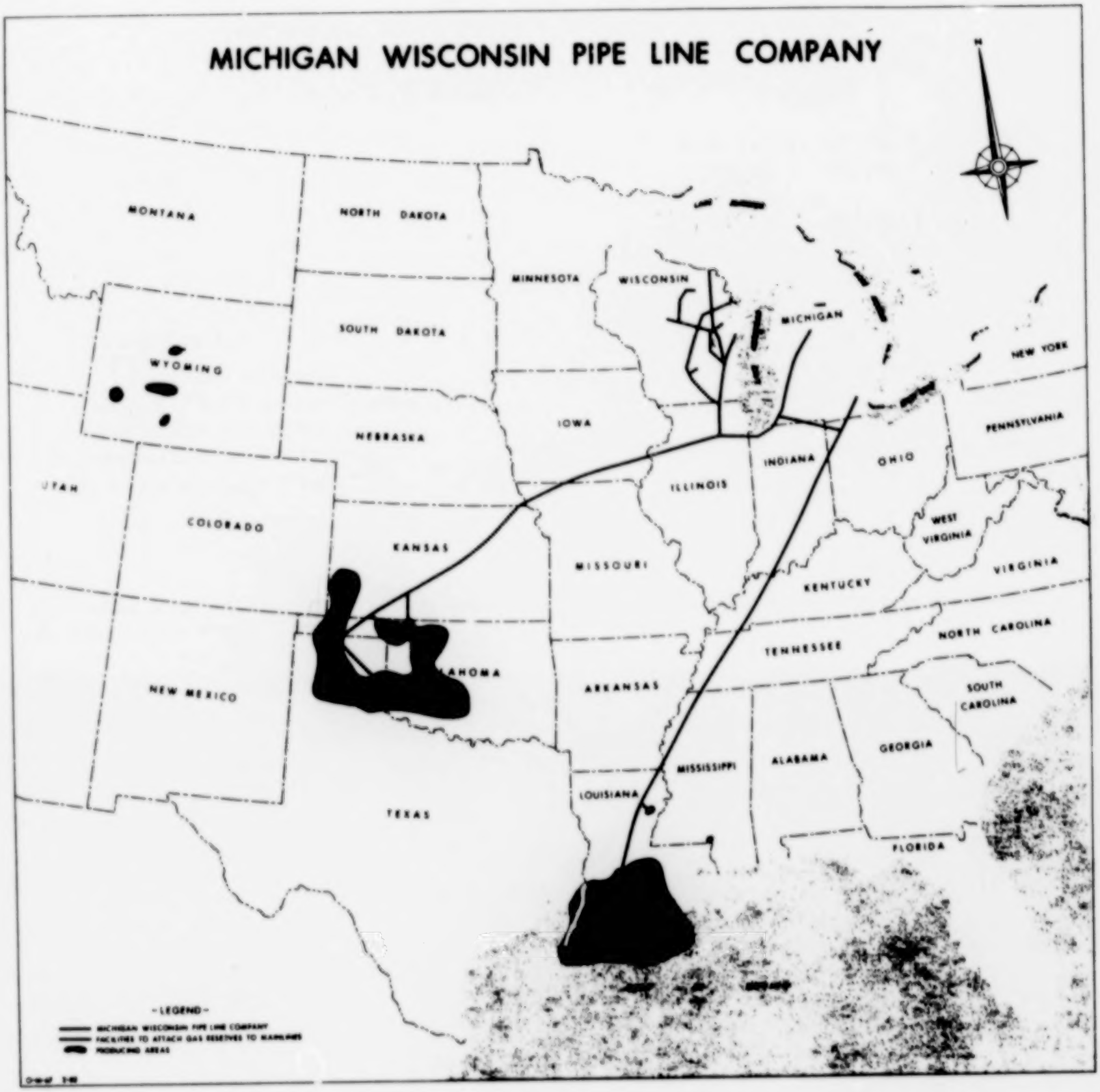
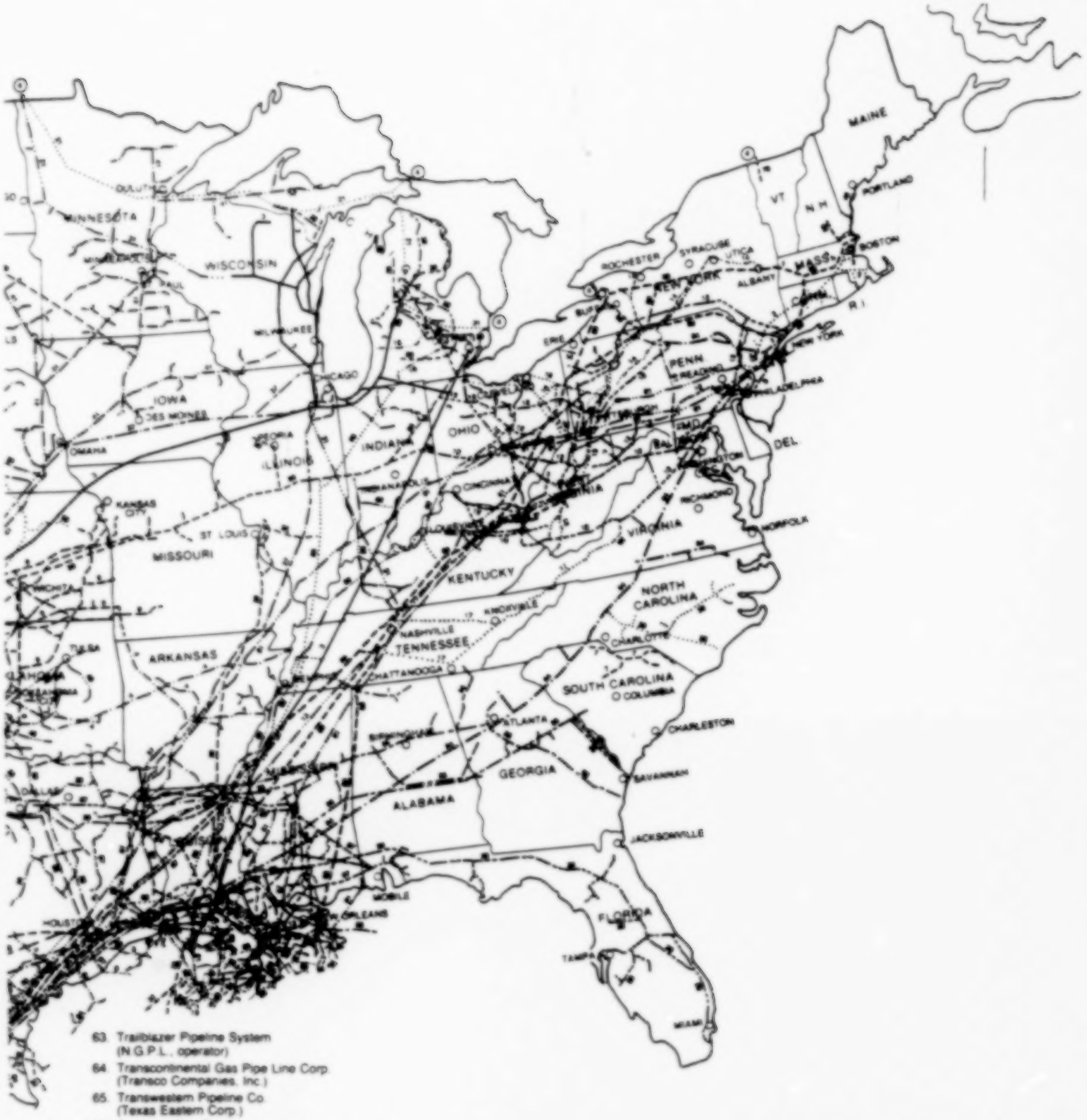

MICHIGAN WISCONSIN PIPE LINE COMPANY
N
MONTANA
NORTH DAKOTA
MINNESOTA
WISCONSIN
MICHIGAN
NEW YORK
SOUTH DAKOTA
WYOMING
NEBRASKA
IOWA
PENNSYLVANIA
INDIANA
OHIO
ILLINOIS
UTAH
COLORADO
KANSAS
WEST VIRGINIA
MISSOURI
VIRGINIA
KENTUCKY
TENNESSEE
NORTH CAROLINA
NEW MEXICO
ARKANSAS
SOUTH CAROLINA
GEORGIA
MISSISSIPPI
ALABAMA
LOUISIANA
TEXAS
FLORIDA
- LEGEND -

EXHIBIT B

ANR PIPELINE COMPANY
Property, Plant and Equipment
December 31, 1983

	Michigan	Other States	Total
		(Thousands of Dollars)	
Property, Plant & Equipment at Original Cost			
Gas Plant In Service			
Pipeline Facilities	$199,101	$1,327,105	$1,526,206
Compressor Facilities	97,298	392,269	489,567
Storage Fields	99,761	—	99,761
Other Facilities	10,643	126,739	137,382
Line Pack Gas	454	4,023	4,477
General Plant	29,273	20,099	49,372
Certificate Filing Fees	731	3,110	3,841
Organization Cost	—	8	8
Total Plant In Service	$437,261	$1,873,353	$2,310,614
Base Gas in Underground Storage(1)	$ 15,614	$ —	$ 15,614
Plant Held for Future Use	168	400	568
Construction Work in Progress	2,671	15,306	17,977
Gas Plant Purchased/Sold	—	172	172
Total Plant Investment	$455,714	$1,889,231	$2,344,945

(1) Does not include A/C 117.1 which represents Working Gas Stored Underground by Others — Non-current, Michigan $13,420 + Illinois $71,624 = $85,044 Total.



63. Trailblazer Pipeline System (N.G.P.L., operator)
64. Transcontinental Gas Pipe Line Corp. (Transco Companies, Inc.)
65. Transwestern Pipeline Co. (Texas Eastern Corp.)
66. Trunkline Gas Co. (Panhandle Eastern Pipe Line Co.)
67. United Gas Pipe Line Co. (United Energy Resources, Inc.)
68. United Texas Transmission Co. (United Energy Resources, Inc.)
69. Valero Transmission Co. (Valero Energy Corp.)
70. Vermont Gas System, Inc.
71. Westar Transmission Co. (Pioneer Corp.)
72. Western Slope Gas Co.

Canadian-United States Interconnections

1. Alberta Natural Gas, LTD.
2. Consolidated Natural Gas, LTD.
3. Nova an Alberta Corp.
4. TransCanada Pipelines
5. West Coast Transmission Co., LTD.

ANR Pipeline Company
An American Natural Resources Company

100 0 100 200 300
SCALE IN MILES

JANUARY, 1984



1. Alabama-Tennessee Natural Gas Co.
2. Algonquin Gas Transmission Co.
3. ANR Pipeline Company (American Natural Resources Co.)
4. Arkansas Louisiana Gas Co.
5. Black Marlin Pipeline Co. (Union Carbide Corp.)
6. Blue Dolphin Pipe Line Co. (Shell Pipe Line Co., operator)
7. Carolina Energies Corp.
8. Chandeleur Pipe Line Co. (Chevron U.S.A. Inc., operator)
9. Cities Services Oil and Gas Corp.
10. Coastal Corp., The
11. Colorado Interstate Gas Co. (The Coastal Corp.)
12. Columbia Gas Transmission Corp. (Columbia Gas System Incorporated)
13. Columbia Gulf Transmission Co. (Columbia Gas System Incorporated)
14. Consolidated Gas Supply Corp. (Consolidated Natural Gas Co.)
15. Consumers Power Co.
16. East Ohio Gas Co., The
17. East Tennessee Natural Gas Co. (Tenneco)
18. El Paso Natural Gas Co. (El Paso Company)
19. Equitable Gas Co.
20. Florida Gas Transmission Co. (Continental Resources Corp.)
21. Great Lakes Gas Transmission Co.
22. High Island Offshore System (ANR Pipeline Co., operator)
23. Houston Pipe Line Co. (Houston Natural Gas Corp.)
24. KN Energy, Inc.
25. Kansas Power & Light Co., The
26. Lone Star Gas Co. (Enserch)
27. Louisville Gas & Electric Co.
28. Michigan Consolidated Gas Co. (Primark Corp.)
29. Michigan Gas Storage Co. (Consumers Power Co.)
30. Mid Louisiana Gas Co.
31. Midwestern Gas Transmission Co. (Tenneco)
32. Mississippi River Transmission Corp. (Missouri Pacific Corp.)
33. McCulloch Gas Transmission Co. (McCulloch Oil Corp.)
34. Montana-Dakota Utilities Co.
35. Montana Power Co.
36. Mountain Fuel Supply Co.
37. Natural Gas Pipeline Company of America (MidCon Corp.)
38. North Carolina Natural Gas Corp.
39. Northern Border Pipeline Co. (Northern Natural Gas Co., operator)
40. Northern Indiana Public Service Co.
41. Northern Natural Gas Co. (Interfinth, Inc.)
42. Northern Utilities, Inc. (Maine)
43. Northern Utilities, Inc. (Wyoming) (KN Energy, Inc.)
44. Northwest Pipeline Corp. (Northwest Energy Corp.)
45. Oasis Pipe Line Co. (Houston Pipe Line Co., operator)
46. Oklahoma Natural Gas Co. (ONEOK Incorporated)
47. Overthrust Pipeline Co. (Mountain Fuel Supply)
48. Pacific Gas & Electric Co.
49. Pacific Gas Transmission
50. Panhandle Eastern Pipe Line Co.
51. Red River Gas Pipe Line Corp. (Pioneer Corp., TXO, ONEOK & Houston Natural Gas Co.)
52. Roanoke Gas Co.
53. Sea Robin Pipeline Co. (United Gas Pipe Line Co., operator)
54. Southern California Gas Co.
55. Southern Natural Gas Co.
56. Southwest Natural Gas Corp.
57. Standard Pacific Gas Line, Inc.
58. Stingray Pipeline Co. (Trunkline Gas Co. & N.G.P.L.)
59. Tarpon Transmission Co. (Leased by Trunkline Gas Co.)
60. Tennessee Gas Pipeline Co. (Tenneco)
61. Texas Eastern Transmission Corp. (Texas Eastern Corp.)
62. Texas Gas Transmission Corp. (Texas Gas Corp.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANR Pipeline Company and
ANR Storage Company,
Plaintiffs,

v

The Michigan Public Service Commission, Eric J. Schneidewind, Matthew E. McLogan and Edwyna G. Anderson,
Defendants.

Civil Action
No. 84-438

HONORABLE
DOUGLAS W.
HILLMAN

DEFENDANTS' ANSWER TO
PLAINTIFFS' FIRST AMENDED COMPLAINT

Don L. Keskey (P 23003)
R. Philip Brown (P 25141)
Assistant Attorneys General
Attorneys for Defendants
1000 Long Boulevard, Suite 11
Lansing, MI 48910
(517) 373-7584

Dated: October 15, 1984

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[CAPTION]

DEFENDANTS' ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendants answer plaintiffs' first amended complaint as follows:

Jurisdiction and Venue

1-5. Answering paragraphs 1-5, Defendants admit the same.

6. Answering paragraph 6, Defendants deny the same, because Plaintiffs seek only injunctive and declaratory relief and there is no amount in controversy.

7. Answering paragraph 7, Defendants admit federal question jurisdiction pursuant to 28 U.S.C. § 1331 over the constitutional and statutory claims raised, but deny jurisdiction [1] under 28 U.S.C. § 1337, because the latter statute is inapplicable. Defendants also admit venue is proper pursuant to 28 U.S.C. § 1391, but deny venue under 28 U.S.C. § 1392, because the latter statute is inapplicable as well.

General Allegations

8. Answering paragraph 8, Defendants admit that ANR Pipeline Company is subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC) pursuant to 15 U.S.C. §§ 717 *et seq*, including such matters as rates, fares, fees, charges and construction. Defendants also admit that FERC presently exercises such jurisdiction over ANR Storage Company. However, Defendants deny that FERC has

legal authority to exercise jurisdiction over ANR Storage Company, because FERC's jurisdiction is limited to the transportation and sale of natural gas in interstate commerce. Natural gas storage in the State of Michigan does not constitute transportation or sale of natural gas in interstate commerce. Defendants also admit that both Plaintiffs must comply with the provisions of the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq*. However, Defendants deny that the Federal Securities Act affects state securities jurisdiction in any way. In fact, 15 U.S.C. § 77 explicitly provides that nothing in the Federal Securities Act affects jurisdiction of state securities commissions. Moreover, Defendants deny that 15 U.S.C. §§ 717 *et seq* or 15 U.S.C. §§ 77a *et seq* are statutes of a kind that create any federal rights enforceable by Plaintiffs [2] under 42 U.S.C. § 1983. In fact, both statutes explicitly foreclose private enforcement by assigning rights of enforcement to federal agencies. Moreover, Defendants deny that either of these acts conflict with any provisions of 1909 PA 144, MCLA §§ 460.301 *et seq*; MSA §§ *22.101 et seq* or with the exercise of the Michigan Public Service Commission (Commission) securities jurisdiction over Plaintiffs. Likewise, Defendants deny that they have violated any provisions of these acts or of the United States Constitution.

9-10. Answering paragraphs 9-10, Defendants admit the same.

11. Answering paragraph 11, Defendants admit that Plaintiffs' business operations are dependent upon capital obtained by issuing securities from time to time, but Defendants deny that such securities are regularly required. Defendants affirmatively allege that Plaintiffs are subject to state securities jurisdiction under 1909 PA 144, MCLA §§ 460.301 *et seq*; MSA §§22.101 *et seq*.

12. Answering paragraph 12, Defendants admit that the Commission has publicly declared in its securities orders concerning Plaintiffs that it does have jurisdiction over securities

issued by Plaintiffs. However, Plaintiffs have never contested the issue before the Commission or elsewhere. Nor have Plaintiffs ever appealed this issue in Michigan courts from any of the Commission's orders. Therefore, the Commission has never addressed the matter with the kind of close scrutiny given con- [3] tested issues. Defendants deny that the Commission's orders create an atmosphere of uncertainty resulting in a severe limitation on the marketability of Plaintiffs' securities. Defendants affirmatively allege that both Plaintiffs have timely marketed securities many times with the Commission's approval.

13. Answering paragraph 13, Defendants can neither admit nor deny whether Plaintiffs' officers, directors, agents and employees are greatly concerned about being subjectd to fines or prosecution for issuing securities without prior Commission approval, because Defendants have no knowlege or information sufficient to form a belief as to the truth of these matters.

14. Answering paragraph 14, Defendants admit that Plaintiffs' failure to obtain Commission approval for their securities issuances would create risk and uncertainty concerning the validity of those securities. Defendants deny that the mere assertion of Commission jurisdiction creates such risk and uncertainty, or requires substantial costs and delays. Defendants affirmatively allege that both Plaintiffs have timely marketed securties many times with the Commission's approval.

15. Answering paragraph 15, Defendants deny the same, because the factual allegations therein are untrue and the legal conclusions are erroneous. [4]

COUNT I

(Pipeline Company)

16-18. Answering paragraphs 16-18, Defendants admit the same.

19. Answering paragraph 19, Defendants state that uniformity of operation and/or regulation with other states is irrelevant to these proceedings. Since Plaintiffs have chosen not to name any other state commissions as defendants in this case, only Michigan securities regulation is at issue herein. Michigan regulation does not result in disruptive, unreasonable or burdensome fees, proceedings or delays. Both Plaintiffs have timely marketed securities many times with the approval of the Commission.

20-21. Answering paragraph 20-21, Defendants deny the same, because the factual allegations therein are untrue and the legal conclusions are erroneous.

22. Answering paragraph 22, Defendants deny that any form of expedited relief is necessary. The Commission has no intention of disrupting Plaintiffs' ongoing business operations, or their securities issuances so long as Plaintiffs follow the laws of the State of Michigan. [5]

COUNT II

(Storage Company)

23. Answering paragraph 23, Defendant neither admits nor denies that Storage Company's natural gas storage business is an interstate activity, because Defendants have no knowledge or information sufficient to form a belief as to the truth of those matters. Defendants admit Storage Company uses a system of natural gas storage facilities located entirely in the State of Michigan.

24. Answering paragraph 23, Defendants admit many of Storage Company's customers are located outside the State of Michigan. Defendants deny that natural gas storage is an integral and essential part of a national interstate pipeline network. The so-called national pipeline network is a collection of independently owned and operated pipelines that generally transport natural gas for others. Generally speaking, those

pipelines are independent entities, not a part of an integrated national interstate pipeline network. Moreover, natural gas storage in general, and Storage Company's activities in particular, are not essential to the business of any single pipeline or the so-called network as a whole. Rather, natural gas storage in general, and Storage Company's activities in particular, are a part of a young growth industry that is complementary to, but not a part of, the natural gas industry. Further, Storage Company's facilities and business operations are located entirely within the State of [6] Michigan and are fully subject to this state's regulatory statutes including the Securities Act which is the subject of this case.

25. Answering paragraph 25, Defendants admit that FERC presently exercises such jurisdiction, but deny that FERC has legal authority over Storage Company, because FERC's jurisdiction is limited to the transportation and sale of natural gas in interstate commerce. Natural gas storage in general, and Storage Company's activities in particular, do not constitute transportation or sale of natural gas in interstate commerce.

26. Answering paragraph 26, Defendants neither admit nor deny the same, because they have no knowledge or information sufficient to form a belief as to the truth of these matters.

27. Answering paragraph 27, Defendants deny that *any* disruption or restriction of natural gas storage will *adversely and materially* affect interstate commerce and the timely availability of natural gas to the consuming public outside the State of Michigan. These allegations are obvious over-statements, which are largely irrelevant. No material disruptions or restrictions of Storage Company's activities are imminent or likely as a result of Defendants' actions. Defendants deny that the Commission's securities regulation constitutes a significant burden on interstate commerce. In fact, Plaintiffs have timely marketed securities many times with the Commission's approval. [7]

28-29. Answering paragraphs 28-29, Defendants deny the same because the factual allegations therein are untrue and the legal conclusions are erroneous.

30. Answering paragraph 30, Defendants deny that any form of expedited relief is necessary. The Commission has no intention of disrupting Plaintiffs' ongoing business operations, or their securities issuances so long as Plaintiffs follow the laws of the State of Michigan.

Affirmative Defenses

31. Plaintiffs' equitable claims are barred by the doctrines of "clean hands" and laches as a result of their failure to litigate and resolve the legal issues, known to Plaintiffs' officers and directors for years, either before the Commission or by appeal of the Commission's orders in a timely manner.

32. Plaintiffs' § 1983 claims are barred by the statute of limitations.

33. Plaintiffs have failed to state a claim upon which relief may be granted:

a. Neither ANR Pipeline Company, nor ANR Storage Company, nor the Commission are "persons" under 42 U.S.C. § 1983.

b. The statutory claims raised are not cognizable under 42 U.S.C. § 1983.

c. Principles of federalism, comity and abstention require dismissal. [8]

34. This court lacks subject matter jurisdiction:

a. The Commission and/or its individual members are immune from suit in federal court under the eleventh amendment to the United States Constitution.

b. Plaintiffs' claims are not of sufficient immediacy and reality to state a "case or controversy."

WHEREFORE, Defendants respectfully request this Honorable Court:

1. Deny any and all relief requested in Plaintiffs' first amended complaint.

2. Dismiss Plaintiffs' first amended complaint.

3. Enter judgment for Defendants on both counts in Plaintiffs' first amended complaint.

4. Alternatively, enter judgment for Defendants on either of the counts in Plaintiffs' first amended complaint. [9]

Respectfully submitted,

FRANK J. KELLEY
ATTORNEY GENERAL

Don L. Keskey (P 23003)
R. Philip Brown (P 25141)
Assistant Attorneys General
Attorneys for Defendants

By: /s/ R. PHILIP BROWN

1000 Long Boulevard, Suite 11
Lansing, MI 48910
(517) 373-7584

Dated: October 15, 1984
[10]

[PROOF OF SERVICE OMITTED IN PRINTING]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[CAPTION]

DEFENDANTS' FIRST REQUEST FOR ADMISSIONS BY PLAINTIFFS

1. Please admit that ANR Storage Company (storage company) has the mission of aggressively marketing underground natural gas storage service to customers not affiliated with American Natural Resources Company. *See*, MPSC Case No. U-6790, Exhibit R-1, p 12 and Exhibit S-38, p 6.

2. Please admit that the growth prospects for storage company appear excellent and that the marketing profile of the gas industry continues to reflect a growing segment of heat sensitive markets whose seasonal demands place ever-increasing pressure on the industry to develop new storage capacity. *Id.*, Exhibit S-39.

3. Please admit that storage company plans to obtain a significant share of the increasing market for natural gas storage, which is expected to grow very substantially in the future. U-6790, Exhibit S-38, p 6. [1]

4. Please admit that storage company was formed for providing increased underground gas storage to other systems around the country. U-6790, Testimony of Arthur R. Seder, Jr., pp 7, 23.

5. Please admit that storage company does not provide storage service to or for pipeline company.

6. Please admit that storage company was not formed to provide system storage to or for pipeline company.

7. Please admit that pipeline company has its own system storage.

8. Please admit that storage company does not provide system storage to or for pipeline company.

9. Please admit that natural gas pipeline system operations and availability of natural gas storage service facilitate and complement each other.

10. Please admit that natural gas storage is an adjunct to pipeline system operations.

11. Please admit that storage company's service and facilities are an adjunct to pipeline company's operations.

12. Please admit that storage company's reservoirs and facilities are not engineered or used as pressure apparatus in pipeline company's system operations. [2]

13. Please admit that pipeline company can operate its system without storage company's facilities and reservoirs.

14. Please admit that many pipeline companies operate their systems without their own storage facilities.

15. Please admit that storage company's facilities and reservoirs are not necessary to the proper operation of pipeline company's system.

16. Please admit that the engineering of a pipeline system does not require storage reservoirs.

Respectfully submitted,

FRANK J. KELLEY
ATTORNEY GENERAL

Don L. Keskey (P 23003)
R. Philip Brown (P 25141)
Assistant Attorneys General
Attorneys for Defendants

By: /s/ R. PHILIP BROWN
1000 Long Boulevard, Suite 11
Lansing, MI 48910
(517) 373-7584

Dated: October 29, 1984
[3]

[PROOF OF SERVICE OMITTED IN PRINTING]

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

[CAPTION]

PLAINTIFFS' ANSWER TO DEFENDANTS' FIRST REQUEST FOR ADMISSIONS

NOW COME Plaintiffs and answer Defendants' First Request for Admissions, dated October 29, 1984, by saying:

1. Admitted.

2. Plaintiffs admit that a few years ago market growth prospects were excellent, but since that time the market has softened somewhat but remains promising. Plaintiffs also admit that the marketing profile of the gas industry continues to reflect a growing segment of heat sensitive markets whose seasonal demand requires storage service which must be provided by existing or newly developed storage capacity. The remaining assertions of request no. 2 are denied.

3. Admitted, subject to the qualifications regarding market growth for gas storage provided by the answers to request nos. 1 and 2 above.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted, and Plaintiffs further assert that natural gas storage service is an integral and essential part of gas pipeline system operations serving temperature sensitive markets.

10. Plaintiffs admit that natural gas storage is an integral part of pipeline system operations serving temperature markets, but the remaining portion of request no. 10 is denied.

11. Denied.

12. Admitted.

13. Admitted.

14. Admitted, although most major pipeline companies have some storage facilities of their own.

15. Admitted.

16. Plaintiffs admit that a pipeline system can be engineered without storage reserviors or facilities, but it would be inefficient and unnecessarily costly to engineer a system serving temperature sensitive markets without including storage.

ANR PIPELINE COMPANY

By /s/ GARY L. COWAN
Gary L. Cowan
Senior Vice President and General Counsel

Dated: November 13, 1984

[-2-]

ANR STORAGE COMPANY

By /s/ PETER R. SCULLEN
Peter R. Scullen
General Attorney and Secretary

[PROOF OF SERVICE OMITTED IN PRINTING]

[-3-]

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

[CAPTION]

PLAINTIFFS' ANSWERS TO DEFENDANTS' FIRST INTERROGATORIES

NOW COME Plaintiffs and answer Defendants' First Interrogatories, dated October 26, 1984, by saying:

1. Q: Is ANR Pipeline Company (pipeline) or ANR Storage Company (storage company) presently planning to issue securities of any kind? If so:

a. What kind of issue(s) is planned?

b. What is the planned date of issue(s)?

c. What is the purpose for the issue(s)? If the purpose is to finance construction, what amount is for facilities located in Michigan?

A: Neither ANR Pipeline Company (''Pipeline Company'') nor ANR Storage Company (''Storage Company'') plan any immediate securities issues.

It is not possible to forecast exactly when either company may need to issue securities, since it depends in substantial part on changing business and economic conditions. According to current projections, Pipeline Company may issue approximately 30 million dollars in securities, not including potential refunding of debts, during 1986 and approximately 100 million dollars during 1987. Storage Company may issue 27 million dollars in securities during 1987. The proceeds from such securities issuances by Pipeline Company would be used to assist in financing construction requirements of approximately 360 million dollars. Of this total, some 30

million dollars is expected to be used for facilities to be constructed in the State of Michigan and FERC filings and certifications would be required prior to expenditure. The proceeds from any such issues by Storage Company would be used for facilities to be constructed in the State of Michigan and FERC filings and certifications would be required prior to expenditure.

2. Q: What securities applications filed with the Michigan Public Service Commission (MPSC) by either company have raised the issue of MPSC jurisdiction? Please list *all* such applications by docket number of the case and state for each:

a. Who signed the applications?

b. Who were the trial and supervisory attorneys involved?

c. Who were the officers in each company at the time?

d. Why was that issue raised then?

e. Who participated in the decision to raise the jurisdictional issue at that time?

f. Who ordered the jurisdictional issue to be raised at that time?

g. Why was that issue not litigated until now? [-2-]

A: The below listed docket matters raised the issue of MPSC jurisdiction:

ANR Pipeline Company (formerly named Michigan Wisconsin Pipe Line Company):

(a) Case No. U-7572	2/15/83
Application filed:	3/31/83
Order issued:	
(b) Case No. U-7221	
Application filed:	6/8/82
Order approving withdrawal of Securities Application:	2/23/83

(c) Case No. U-7108
Application filed: 1/15/82
Order issued: 3/2/82

(d) Case No. U-6766
Application filed: 2/9/81
Order issued: 3/10/81

(e) Case No. U-6439
Application filed: 2/27/80
Order issued: 3/25/80

(f) Case No. U-6257
Application filed: 8/24/79
Order issued: 9/11/79

(g) Case No. U-6189
Application filed: 6/29/79
Order issued: 7/31/79

Storage Company:

(a) Case No. U-7617
Application filed: 4/7/83
Order issued: 5/18/83

(b) Case No. U-7302
Application filed: 10/9/81
Order issued: 11/24/81

[-3-]

(c) Case No. U-6637
Application filed: 10/14/80
Order approving withdrawal of application: 9/9/81

During the years 1970 through 1979, no applications were filed with the MPSC because, after the Michigan Court of Appeals decision in *Great Lakes Gas Transmission Company* v *MPSC*, 24 Mich Ap 77 (1970), the MPSC advised Pipeline Company (then Michigan Wisconsin Pipeline Company) that

the security issuances of Michigan Wisconsin were not subject to consideration by the commission under Act 144, PA 1909.

The jurisdiction issue was not litigated until now because Plaintiffs' very existence and ability to operate was dependent upon their ability to raise money through their securities issuances, and Plaintiffs were fearful that litigation might cause delay in MPSC approval of applications filed under Act 144, PA 1909.

This litigation was finally instituted after the decision of the Michigan Court of Appeals in *Western Union* v *PSC*, 127 Mich App 89 (1983) wherein the court held that the MPSC has no constitutional right to exercise jurisdiction over Western Union because to do so would unconstitutionally burden interstate commerce. Moreover, Plaintiffs forecast that neither company would need to issue and market additional securities prior to 1986.

As to the remaining portions of question No. 2, Plaintiffs object to them as being irrelevant, immaterial and unreasonably burdensome to answer. In addition, such information is [-4-] readily available from Defendant MPSC's own files and records.

3. Q: What was the elapsed time from date of application to date of order in all securities cases before the MPSC for both companies over the last 25 years?

A. Between 1970 and 1979, neither company filed any securities applications with the MPSC, after that agency advised Pipeline Company (then Michigan Wisconsin Pipe Line Company) that its security issuances were not subject to consideration by the commission under Act 144, PA 1909. However, after the Michigan Supreme Court handed down its decision in *Michigan Gas Storage Co.* v *Public Service Commission*, 405 Mich 376 (1979), it appeared as a matter of state law that Act 144, PA 1909 did apply to Plaintiffs' issue of

securities. Accordingly, Plaintiffs thereafter began filing approval applications with the MPSC in order to satisfy the concerns of their underwriters and financial advisors and insure the marketability of their securities, even though they did not feel that the agency had jurisdiction as a matter of federal constitutional law.

The elapsed time from date of application to date of order is the difference between the application and order date set forth in Plaintiffs' answer to interrogatory No. 1 above.

As to all securities issued prior to 1970, Plaintiffs object to the interrogatory as being irrelevant, immaterial and unreasonably burdensome to answer. In addition, such information is readily available from Defendant MPSC's own files and records.

4. Q: What securities issues have each company made over the last 25 years? [-5-]

a. Which did the MPSC approve?

b. Which did the MPSC disapprove?

c. Which did the company make without MPSC approval? If any, why was MPSC approval not sought?

A. With two exceptions, the MPSC approved all securities applications filed by each company since 1970, although no applications for approval were filed during the period 1970-1979 because of the MPSC's statement in 1970 that Act 144, PA 1909 did not apply. For obvious reasons, no application was disapproved during that same period.

On June 8, 1982, Pipeline Company filed an application for approval of certain proposed securities issuances which included the guaranteeing of certain financing by ANR Production Company, then a subsidiary of Pipeline Company. Instead of promptly approving the application as it had done in the past, the MPSC issued a "Notice of Inquiry", setting

the matter for hearing on August 19, 1982, apparently due to the agency's objection to the above-referenced guarantee of financing by a subsidiary. To avoid the delay imposed by the hearing procedure, Pipeline Company withdrew its application. Thereafter, Pipeline Company filed a new application which omitted the controversial item in the original filing. Such new application was approved on March 31, 1983.

On October 14, 1980, Storage Company filed for approval of securities (Case No. U-6637). On October 31, 1980, having been advised by MPSC representatives that hearings would be held, [-6-] Storage Company filed a withdrawal of the application. On September 9, 1981, the MPSC issued an "Approval of Request to Withdraw". On October 9, 1981, following settlement of issues between the MPSC and Storage Company's parent regarding divestiture of Michigan Consolidated Gas Company, Storage Company filed another application for approval of securities (Case No. U-7032) which the MPSC granted approximately six weeks later, on November 24, 1981.

Plaintiffs object to interrogatory No. 4, to the extent that it inquires about the period prior to 1970, on the basis that the information is irrelevant, immaterial and unreasonably burdensome to answer. In addition, such information is readily available from Defendant MPSC's own files and records.

5. Q: Does storage company transport or otherwise move or sell gas across state boundaries? If so, describe the activities involved.

A: Storage Company participates in the transportation and movement of gas across state boundaries by receiving gas for storage service which has been transported in continuous movement from outside Michigan by pipelines which are an integral part of our national interstate gas pipeline system, and by redelivering the storage gas into such pipelines for transportation in continuous movement across the Michigan boundary to destinations outside the state.

6. Q: Does either company transport or otherwise move or sell gas on a purely intrastate basis? If so, describe the activities involved including the volumes.

A: No. [-7-]

7. Q: Is ANR (the parent company) a public utility holding company as defined under federal law? If not, explain why not.

A: No, because it does not hold any "utilities" as the term is defined under the federal statute.

8. Q: Please describe the process followed by each company with the SEC before securities may be issued.

A: Sales of debt and equity securities in public or private transactions must be made in conformity with the federal securities statutes, rules and regulations which mandate that certain information must be provided to investors.

Public sales of securities by either Pipeline Company or Storage Company could be made only after the SEC had been satisfied that the requisite information about the Company and the securities it proposes to sell would be provided to investors.

To that end, either Company would prepare and file registration statements with the SEC. Such registration statements would have to contain information about the subject company's financial condition, its capital structure and the use it intends to make of the proceeds from the sale of securities to be registered. Upon the satisfaction of the statutory and regulatory requirements, those registration statements would become effective.

Transactions which do not involve sales to the public nonetheless entitle investors to have access to material information and afford them protection against fraudulent and manipulative practices. [-8-]

9. Q: Does FERC regulate securities by either company in any way? If so, describe the process.

A: Yes. Pursuant to its regulatory authority under the Natural Gas Act, the FERC reviews in rate cases the capital structure of the regulated natural gas company, the interest rates that it pays with its debt securities, its debt-equity ratio, and any other aspects of its financial structure that FERC may deem material.

In certificate cases, the FERC reviews the applicant company's plans to finance the proposed facilities, including issuance of securities if proposed. If it considers it appropriate, the FERC may, by exercise of its rate or certificate authority, impose specific conditions on financing, as it did in the case of Storage Company in Docket Nos. RP81-66 and RP81-41. There the FERC, among other things, sets limits on the amount of interest that Storage Company could recover on short-term debt and sets a date by which Storage Company had to obtain longer-term fixed-rate financing. In order to meet those conditions, Storage Company had to secure MPSC approval of the issuance of the longer-term, fixed-rate securities.

Stability in the markets for securities of natural gas companies regulated by the FERC exists because investors have been able to rely on the FERC's long-standing practice of basing such companies' rates on a capital structure which includes, among other things, the companies' actual cost of debt. [-9-]

10. Q: Does pipeline make direct sales in Michigan? If so:

a. What customers are served directly?

b. What volumes are sold to each?

A: No. Pipeline Company only sells to distribution companies located in Michigan and elsewhere.

11. Q: Does either company carry or transport natural gas for public use?

a. If so, describe the activity involved.

b. If not, explain how the Michigan public utilities securities statute applies to that company.

A: Yes. Pipeline Company transports and sells (for resale) gas in interstate commerce. Storage Company causes gas to be transported to and from its storage facilities, and the company's storage facilities and pipelines are an integral part of our national interstate gas pipeline system.

12. Q: What characteristics of pipeline's operations, if any, become considerations in storage company's decisions to store gas for potential customers?

A: None. However, the cost and availability of Pipeline Company's transmission facilities are considerations for Storage Company's customers relative to their decision to contract with Storage Company for gas storage service.

13. Q: What characteristics of storage company's operations, if any, become considerations in pipeline's decisions to purchase from potential suppliers, or transport and sell gas to potential customers? [-10-]

A: None.

14. Q: Does pipeline presently have excess storage in the storage fields it operates?

A: No.

15. Q: Is storage company providing any storage service for pipeline customers as part of any agreements to purchase

gas from the pipeline that would not have been made without providing the storage?

A: No.

ANR PIPELINE COMPANY

By /s/ Gary L. Cowan
Its Senior Vice President and
General Counsel

Dated: December 18, 1984

ANR STORAGE COMPANY

By /s/ Peter R. Scullen
Its Secretary

Dated: December 18, 1984

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Gary L. Cowan, having been first duly sworn, deposes and says that he is the person who executed the foregoing instrument on behalf of ANR Pipeline Company, that he has read the same and knows the contents thereof, and that the matters stated therein are true to his knowledge, except such matters as are stated to be upon information and belief, and, as to those matters, he believes them to be true. [-11-]

Subscribed and sworn to before me this 18th day of December, 1984.

/s/ Mary Anne Carosin
Notary Public, Wayne County, Michigan
My commission
expires: September 15, 1986

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Peter R. Scullen, having been first duly sworn, deposes and says that he is the person who executed the foregoing instrument on behalf of ANR Storage Company, that he has read the same and knows the contents thereof, and that the matters stated therein are true to his knowledge, except such matters as are stated to be upon information and belief, and, as to those matters, he believes them to be true.

Subscribed and sworn to before me this 18th day of December, 1984.

/s/ KATHEY LYNNE TAYLOR
Notary Public, Wayne County, Michigan
My commission
expires: November 18, 1987

[-12-]

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

[CAPTION]

PLAINTIFFS' ANSWERS TO DEFENDANTS' SECOND INTERROGATORIES

NOW COME Plaintiffs and answer Defendants' Second Interrogatories, dated October 29, 1984, by saying:

1. Q: What are storage company's present plans for developing storage capacity through 1994?

A: Storage Company's present plans include arranging for the development of an additional 15.7 Bcf of storage capacity

to provide gas storage service for Transcontinental Gas Pipeline Company ("Transco") under a long-term contract. Like Storage Company's other customers, Transco is a pipeline company operating outside of Michigan, and the gas stored by Storage Company under the Transco arrangement will be delivered to Storage Company for storage service from outside the state of Michigan and, upon withdrawal from storage, redelivered to Transco for use outside of Michigan.

Beyond this specifically planned expansion, Storage Company expects to aggressively compete for whatever additional interstate gas storage service business becomes available, and the company expects to develop and finance whatever additional gas storage capacity may be needed to meet the demands of this complex and changing national market.

2. Q: What was storage company's total storage capacity at calendar year's end for each of the years 1978 through 1983?

A:

Year Ending	Working Storage Capacity (MMcf)
1978.....	- 0 -
1979.....	- 0 -
1980.....	38,300
1981.....	51,140
1982.....	52,876
1983.....	52,876

3. Q: What is storage company's present storage capacity?

A: 52,876 MMcf working storage capacity.

4. Q: What is storage company's target for capturing a percentage of the natural gas storage market?

A: Storage Company has no specific percentage target. See answer to interrogatory No. 1, above, for Storage Company's plans for next ten years.

5. Q: How many customers does storage company presently have?

A: Seven; see p. 10 of Plaintiffs' Amended Complaint for specific names and addresses. [-2-]

6. Q: How many of storage company's present customers use(d) pipeline company to transport their gas to storage?

a. How many of those require(d) storage service as a condition for purchasing the transportation service?

A: Six (all but Inter-City Gas Corporation which utilized the Great Lakes Gas Transmission Company pipeline) of Storage Company's present customers use(d) Pipeline Company to transport their gas to storage. None of these customers require storage service as a condition of purchasing the transportation service; but, obviously, these customers are purchasing the transportation service in order to use the storage service provided by Storage Company.

7. Q: How many of storage company's present customers purchase(d) their stored gas from pipeline company?

a. How many of those require(d) storage service as a condition of the sale?

A: None.

8. Q: How many of storage company's present customers use(d) pipeline company to transport their gas from storage?

a. How many of those also use(d) pipeline to transport their gas to storage?

b. Of those that use(d) pipeline company to transport their gas to and from storage, how many also purchase(d) their gas from pipeline company?

A: All of Storage Company's present customers, except Inter-City Gas Corporation, use Pipeline Company, as well as other [-3-] pipeline companies, to transport their gas both to and from storage. Inter-City Gas Corporation uses a pipeline owned by Great Lakes Gas Transmission Company to transport its gas to and from storage.

None of Storage Company's present customers purchase their gas from Pipeline Company.

9. Q: Please provide a copy of American Natural Resources Company's latest annual report to shareholders.

A: A copy of the 1983 annual report to shareholders of American Natural Resources has been provided to Defendants with their copy of these Answers to Interrogatories.

ANR PIPELINE COMPANY

By /s/ GARY L. COWAN
Its Senior Vice President
and General Counsel

Dated: December 18, 1984

ANR STORAGE COMPANY

By /s/ PETER R. SCULLEN
Its Secretary

Dated: December 18, 1984

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Gary L. Cowan, having been first duly sworn, deposes and says that he is the person who executed the foregoing instrument on behalf of ANR Pipeline Company, that he has read [-4-] the same and knows the contents thereof, and that the matters stated therein are true to his knowledge, except such

matters as are stated to be upon information and belief, and, as to those matters, he believes them to be true.

Subscribed and sworn to before me this 18th day of December, 1984.

/s/ MARY ANN CAROSIO

Notary Public, Wayne County, Michigan
My commission
expires: September 15, 1986

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Peter R. Scullen, having been first duly sworn, deposes and says that he is the person who executed the foregoing instrument on behalf of ANR Storage Company, that he has read the same and knows the contents thereof, and that the matters stated therein are true to his knowledge, except such matters as are stated to be upon information and belief, and, as to those matters, he believes them to be true.

Subscribed and sworn to before me this 18th day of December, 1984.

/s/ KATHY LYNNE TAYLOR

Notary Public, Wayne County, Michigan
My commission
expires: November 18, 1987

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Gary L. Cowan, having been first duly sworn, deposes and says that he is the person who executed the foregoing instrument on behalf of ANR Storage Company, that he has read the same and knows the contents thereof, and that the matters stated therein are true to his knowledge, except such matters as are stated to be upon information and belief, and, as to those matters, he believes them to be true.

Subscribed and sworn to before me this 18th day of December, 1984.

/s/ MARY ANN CAROSIO

Notary Public, Wayne County, Michigan
My commission
expires: September 15, 1987

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Peter R. Scullen, having been first duly sworn, deposes and says that he is the person who executed the foregoing instrument on behalf of ANR Pipeline Company, that he has read the same and knows the contents thereof, and that the matters stated therein are true to his knowledge, except such matters as are stated to be upon information and belief, and, as to those matters, he believes them to be true.

Subscribed and sworn to before me this 18th day of December, 1984.

/s/ KATHY LYNNE TAYLOR

Notary Public, Wayne County, Michigan
My commission
expires: November 18, 1987

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

[CAPTION]

PLAINTIFFS' ANSWERS TO DEFENDANTS' THIRD INTERROGATORIES

NOW COME Plaintiffs and answer Defendants' Third Interrogatories, dated November 21, 1984, by saying:

1. Q: Has storage company had excess (unutilized) storage capacity in any of the last five calendar years? If so, state the volumes by year.

A:

Year	Excess ("Unutilized") Working Storage Capacity
1978	-0-
1979	-0-
1980	-0-
1981	.6 Bcf
1982	2.3 Bcf
1983	2.3 Bcf through June 30; -0- thereafter
1984	-0- through March 31; 2.3 Bcf to the present

2. Q: Does storage company presently have excess (unutilized) storage capacity? If so, state the volumes.

A: See answer to interrogatory No. 1 above.

3. Q: Does storage company project excess (unutilized) storage capacity in any of the next five calendar years? If so, state the volumes by year.

A: No, except as qualified by the answer given to Interrogatory No. 1 above.

4. Q: Has pipeline company had excess (unutilized) storage capacity in any of the past five calendar years? If so, state volumes by year.

A: No.

5. Q: Does pipeline company project excess (unutilized) storage capacity in any of the next five calendar years? If so, state the volumes by year.

A: No.

6. Q: If your answer to question number 14 of Defendant's First Interrogatories for Plaintiffs is yes, please state the volumes.

A: Because the answer to interrogatory No. 14 of Defendants' First Interrogatories is "No", no answer is required.

7. Q: How much of pipeline company's present sales market, stated as a percentage of total volumes sold, is temperature sensitive?

A: Pipeline Company estimates that 60 to 65% of its sales volumes are in the residential and commercial sectors which are virtually all sensitive to temperature.

8. Q: Is storage company an integral and essential part of pipeline company's system operations? If so, explain how and reconcile your answer with the reasons for denying our First Request for Admissions by Plaintiffs, number 11.

A: Storage Company is not an integral and essential part of Pipeline Company's system operations. [-2-]

However, in a broader sense, it can be stated that both Storage Company and Pipeline Company are an integral and essential part of our complex inter-connected national interstate gas pipeline system which makes gas available throughout the country in quantities and at delivery rates that the gas consuming public requires at any given time. Certainly, both

storage service and pipeline transportation are essential functions of this complex interstate system, and both Storage Company and pipeline Company are essential elements of the system. In fact, it is the obvious need for uniform and centralized regulation and control by the FERC of all of the interrelated elements of this vast and complicated interstate system that makes any interference by the Michigan Public Service Commission, pursuant to its claim of authority under 1909 PA 144, so burdensome.

ANR PIPELINE COMPANY

By /s/ GARY L. COWAN
Its Senior Vice President
and General Counsel

Dated: December 18, 1984

ANR STORAGE COMPANY

By /s/ PETER R. SCHILLER
Its Secretary

Dated: December 18, 1984

[-3-]

[PROOF OF SERVICE OMITTED IN PRINTING]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[CAPTION]

DEFENDANTS' SECOND REQUEST FOR ADMISSIONS BY PLAINTIFFS

1. Please admit that storage company owns no natural gas transportation facilities that cross state boundaries.

2. Please admit that storage company does not itself transport natural gas across state boundaries.

3. Please admit that storage company does not sell natural gas.

4. Please admit that storage company carries or transports natural gas only between pipeline company's pipelines and storage company's compressors and storage facilities.

5. Please admit that storage company does not charge a separate transportation rate for transporting natural gas from pipeline company's pipelines to storage company's compressors and storage facilities. [1]

6. Please admit that the process followed by each company with the SEC before securities may be issued to the public usually consists only of filing a registration statement.

7. Please admit that, by reviewing capital structure, interest rates, financial ratios and other aspects of financial structure in rate cases, FERC does not require prior agency approval of securities issuances.

8. Please admit that, by reviewing financing plans in certificate proceedings, FERC does not require prior agency approval of securities issuances.

9. Please admit that FERC does not review financing plans or securities issuances made for purposes other than construction.

Respectfully submitted,

FRANK J. KELLEY
ATTORNEY GENERAL

Don L. Keskey (P 23003)
R. Philip Brown (P 25141)
Assistant Attorneys General
Attorneys for Defendants

By: /s/ R. PHILIP BROWN

1000 Long Boulevard, Suite 11
Lansing, MI 48910
(517) 373-7584

Dated: December 19, 1984

[2]

[PROOF OF SERVICE OMITTED IN PRINTING]

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

[CAPTION]

PLAINTIFFS' REPLY TO DEFENDANTS' SECOND REQUEST FOR ADMISSIONS

NOW COME Plaintiffs and reply to Defendants' Second Request for Admissions by saying:

1. Admitted.

2. Admitted, although the gas stored by Storage Company is transported to Storage Company's facilities by its storage service customers from outside the state of Michigan and across the state boundary in continuous movement through interstate pipelines, and when a customer's gas is withdrawn from storage it is delivered by Storage Company into interstate pipeline facilities which transport the gas in continuous movement across the state boundary for redelivery to the customer outside of Michigan.

3. Admitted.

4. Denied. In fact, Storage Company transports all of its customers' gas to and from Storage Company's compressors and storage facilities by using its own pipelines located between such facilities and the connection between Storage Company's pipeline and the interstate pipeline of Great Lakes at Deward, Michigan.

5. Admitted. The single service charge by Storage Company for providing gas storage service covered both the use of Storage Company's pipeline from the Great Lakes Pipeline at Deward to its storage facilities and the use of the storage

facilities themselves. No gas is transported by Storage Company directly from Pipeline Company's facilities.

6. Denied.

7. Plaintiffs admit that this is generally true. However, in the case of "project financing", the securities issuances involved are specifically related to and conditioned upon the rates approved by the FERC, and approval or disapproval in the rate case in such instance effectively constitutes approval or disapproval of the securities issuance.

8. Plaintiffs admit that this is generally true except for "project financing", for the reasons set forth in replying to No. 7 above.

9. Denied.

ANR PIPELINE COMPANY

By /s/ GARY L. COWAN
Gary L. Cowan
Senior Vice President and
General Counsel

Dated: January 10, 1985

[-2-]

ANR STORAGE COMPANY

By /s/ PETER R. SCULLEN
Peter R. Scullen
General Attorney and Secretary

Dated: January __, 1985

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Gary L. Cowan, having been first duly sworn, deposes and says that he is the person who executed the foregoing instrument on behalf of ANR Pipeline Company, that he has read the same and knows the contents thereof, and that the matters stated therein are true to his knowledge, except such matters as are stated to be upon information and belief, and, as to those matters, he believes them to be true.

Subscribed and sworn to before me this 10th day of January, 1985.

/s/ MARY ANNE CAROSIO
Notary Public, Wayne County, MI
My commission expires: September 15, 1986

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Peter R. Scullen, having been first duly sworn, deposes and says that he is the person who executed the foregoing instrument on behalf of ANR Storage Company, that he has read the same and knows the contents thereof, and that the matters stated therein are true to his knowledge, except such matters as are stated to be upon information and belief, and, as to those matters, he believes them to be true.

Subscribed and sworn to before me this 11th day of January, 1985.

/s/ KATHY LYNNE TAYLOR
Notary Public, Wayne County, MI
My commission expires: November 18, 1987

[-3-]

PROOF OF SERVICE OMITTED IN PRINTING

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

[CAPTION]

STIPULATION OF FACTS

GENERAL BACKGROUND

Plaintiff ANR Pipeline Company ("Pipeline Company") is a Delaware corporation organized in 1945, having its principal office at 500 Renaissance Center, Detroit, Michigan. Prior to January 1, 1984, Pipeline Company was known as Michigan Wisconsin Pipe Line Company. Plaintiff ANR Storage Company ("Storage Company") is a Michigan corporation organized in 1978, having its principal office at One Woodward Avenue, Detroit, Michigan.

Both Pipeline Company and Storage Company are wholly-owned subsidiaries of American Natural Resources Company ("ANR"). ANR was initially organized in 1901 and is now a Delaware corporation. ANR is a diversified holding company, whose principal lines of business, conducted through subsidiaries, include interstate transportation, storage, purchase, exchange and sale of natural gas, oil and gas exploration and production, trucking, coal and new energy technology. ANR has its principal office at One Woodward Avenue, Detroit, Michigan.

Michigan Consolidated Gas Company ("MCGC") was a wholly-owned subsidiary of ANR until the end of 1981, when ANR divested itself of ownership of that intrastate gas distribution company. MCGC was and is a utility with gas distribution, transmission and storage operations in Michigan.

The MPSC tried to exercise jurisdiction over the securities transactions involved in the divestiture, but was enjoined by a

state circuit court in a suit filed by ANR and MCGC. See Appendix, Tab 20. While the case was on appeal, the MPSC in an order dated December 1, 1981, approved a settlement agreement reached in proceedings before the commission. See Appendix, Tab 21. These proceedings followed MPSC inquiries and show cause orders regarding the manner and extent of the proposed divestiture. The MPSC's orders were issued, in part, in reliance on the state securities statute that is the subject of this dispute. Both the settlement and order in that matter specifically noted that commission jurisdiction was neither admitted nor denied. See Appendix, Tab 21, p. 7 of order and p. 10 of settlement. In the proceedings before the MPSC, one of the reasons given by ANR [-2-] for divestiture was its claim that under regulation by the MPSC, MCGC had been unable to earn a fair rate of return on its investment. Also, the MPSC Staff claimed that ANR was attempting to strip MCGC of some of its most lucrative business opportunities and assets. See Appendix, Tabs 10, 11 and 12 for copies of the MPSC's March 5, 1981 order in Case No. U-6790 and orders of August 10 and December 1, 1981 in Case No. U-6954 related to the divestiture of MCGC by ANR.

Because MCGC was ANR's last subsidiary with intrastate retail gas distribution operations, this divestiture completely removed the ANR system from the retail gas distribution business. As a result, ANR is not a public utility holding company as defined under federal law.

Even without the type of broad regulatory authority given to the MPSC over local distribution companies like MCGC, the MPSC can still exert influence over Pipeline Company and Storage Company, if it has the right to regulate and control security issuances by such companies. With the MPSC claiming regulatory jurisdiction over the security issuances of

both companies, the basic issue involved in this controversy has been framed.*

PIPELINE COMPANY

Business. Pipeline Company's certificate of incorporation, relative to authorized business activity, is set forth in the Appendix at Tab 9. Pipeline Company owns and operates an interstate natural gas pipeline system which presently transports and sells gas for resale only, to 51 gas distribution customers in Michigan, Wisconsin, Iowa, Illinois, Indiana, Kansas, Missouri, Ohio and Tennessee. Pipeline Company has no direct retail customers in Michigan and presently has no plans for any. Although Pipeline Company's revenues are derived principally from the sale of gas at wholesale, it also derives income by providing storage and transportation service for other gas companies, using extensive underground gas transmission pipelines and gas storage facilities located in Michigan and in other states.

During 1983, approximately 86% of Pipeline Company's gas supply was purchased from independent producers in Kansas, Louisiana, Mississippi, Oklahoma, Texas, Wyoming and the Texas and Louisiana offshore areas. The balance of Pipeline Company's gas supply was obtained from its affiliate Great Lakes Gas Transmission Company ("Great Lakes"), which is 50% owned by ANR, and from five other non-affiliated pipeline suppliers.

Facilities. Pipeline Company's two interconnected large-diameter multiple line systems transport gas to the midwest from [-4-] (1) the Hugoton Field and other fields in the Anadarko Basin in Texas, Kansas and Oklahoma and (2) the Louisiana onshore and Louisiana and Texas offshore areas.

* The question of MPSC jurisdiction over either company with respect to gas pipeline safety matters or jurisdiction under 1923 PA 238 or 1929 PA 69 is not at issue in this case. [-3-]

Gas from Wyoming is obtained through exchange agreements with other pipeline companies. See Appendix, Tabs 5 and 6, for maps illustrating Pipeline Company's major pipelines.

Pipeline Company operates its pipeline facilities in conjunction with its own company-owned and with leased* but company-operated underground gas storage fields in Michigan. This storage system is used to store excess gas when the company's relatively constant supplier deliveries are greater than customer demands, and the gas so stored is later withdrawn to supplement pipeline deliveries in order to meet winter demand. Appendix Tab 3, p. 512A shows Pipeline Company's storage customers. Appendix Tab 3, p. 520 and Tabs 5 and 6 show the location of Pipeline Company's facilities. Appendix Tab 9 shows the facilities leased from MCGC. Appendix Tab 7 contains the dollar value of the company's facilities located in states where it operates. Appendix Tab 3, p. 514 shows the total miles of transmission lines in each state where it operates.

Pipeline Company operates 15 gas storage fields in Michigan. Eight are owned by MCGC and leased to Pipeline Company; the Norwich and Goodwell fields in Newaygo County, the Reed City and Loreed fields in Osceola and Lake Counties, the Austin (Woolfolk) field in Mecosta County, the Orient field in Osceola and Clare Counties, and the Lincoln-Freeman and North Hamilton fields in Clare County. Pipeline Company owns the Croton field in Newaygo County, the Winfield field in Montcalm County, the Coldwater field in Isabella County, the Central Charlton 1 and South Chester 15 fields in Otsego County, and the Capac and Muttonville fields in St. Clair County.

Pipeline Company owns and operates 773 miles of gas transmission pipeline and associated equipment located in Michigan. Pipeline Company owns and operates two multiple, large-diameter pipelines entering Michigan from Indiana

* Pipeline Company's leased storage fields are owned by MCGC. [-5-]

in the southwest part of the state, which connect to gas storage fields in central Michigan. These pipelines also connect to three local gas distribution utilities in the western part of the lower peninsula; MCGC, Michigan Power Company and Michigan Gas Utilities Company (MGU).

Pipeline Company owns and operates a multiple large diameter pipeline which enters the state from Ohio and is used to deliver gas to MGU and MCGC for distribution in the southeastern [-6-] counties of Michigan. This pipeline connects with MCGC's Interstate Storage Division pipelines which are used when MCGC renders interstate storage and transportation service regulated by the FERC. MCGC uses these pipelines in intrastate storage as well.

Pipeline Company also has a transmission pipeline in the upper peninsula which extends from Great Lakes' pipeline into Wisconsin, with a point of delivery to MCGC at Crystal Falls, Michigan, and a line from Wisconsin to a point of delivery to MCGC at Menominee, Michigan.

Pipeline Company also owns and operates 195 miles of field and storage pipelines in Michigan. The Croton and Winfield storage fields are directly connected to Pipeline Company's transmission lines by its own storage lines. The Reed City, Loreed, Orient and Lincoln-Freeman storage fields are connected to its transmission system by its own storage lines and by pipelines leased from MCGC. The Norwich and Goodwell storage fields are connected to Pipeline Company facilities only through pipelines leased from MCGC. The Central Charlton 1 and South Chester 15, Capac and Muttonville fields are all remote from Pipeline Company's transmission system and from other storage fields. They are connected to Great Lakes' transmission lines by Pipeline Company's own storage lines.

Pipeline Company has two transmission compressor stations and ten underground storage compressor stations in

Michigan. Appendix Tab 3, p. 520 (O-M-215) is a map showing the [-7-] entire Pipeline Company system. Appendix Tab 3 shows storage fields, compressor stations, transmission lines and delivery points.

Outside the state of Michigan, Pipeline Company owns and operates 6,947 miles of gas transmission pipeline and associated equipment, 3,507 miles of gathering lines, 35 transmission compressor stations and 54 field compressor stations.

Operations. Pipeline Company transports natural gas purchased from producers in Texas, Oklahoma, Kansas, Louisiana and Wyoming via large diameter, cross-country pipelines, primarily to the states of Michigan and Wisconsin. All of the gas transported to Wisconsin is delivered directly to purchasing gas distribution utilities for immediate resale to their customers. Most of the gas transported to Michigan during the colder months is delivered directly to gas distribution utilities for resale to their customers, with relatively minor volumes occasionally being injected into storage.

The normal injection season extends from April through October. Gas delivered to Michigan by Pipeline Company in excess of the need of customers of the gas distribution utilities is injected into underground storage fields located in the lower peninsula and operated by Pipeline Company or by distribution utilities. [-8-]

Usually, during the colder months gas stored during the warmer months is withdrawn for delivery to Pipeline Company's gas distribution utility customers in Michigan and Wisconsin or to Pipeline Company's Storage Service customers.

Wisconsin's wintertime needs are normally met by gas flowing from the southwest, Canada, storage fields in Michigan and by purchases from another pipeline company.

Sales. During 1983, Pipeline Company sold 555 billion cubic feet ("Bcf") of gas to its customers, of which approximately 72% was sold to its three largest customers: MCGC,

Wisconsin Gas Company and Wisconsin Natural Gas Company. MCGC serves the cities of Detroit, Grand Rapids, Muskegon, Ann Arbor, Ypsilanti, and their surrounding areas, plus numerous other communities in the upper and lower peninsulas. Wisconsin Gas Company serves the Milwaukee metropolitan area and numerous other communities in Wisconsin. Wisconsin Natural Gas Company serves the cities of Racine, Kenosha, Appleton and surrounding areas in Wisconsin. Over 50% of Pipeline Company's 1983 sales were in Michigan, approximatley 45% in Wisconsin and less than 5% in other states.

Storage and Transportation. In 1983, Pipeline Company transported approximately 373.5 billion cubic feet (Bcf) of gas under long-term agreements with non-affiliated pipeline companies and approximately 97.8 Bcf of gas for others such as industries, gas utilities, oil companies and intrastate pipelines. [-9-]

Pipeline Company provides 28.7 Bcf of storage service to other gas companies on a long-term basis. Under this arrangement, the customers' gas is delivered into Pipeline Company's integrated system of pipelines and storage field facilities during the summer months, and an equivalent volume of gas is thereafter redelivered to these customers, at daily rates up to 315 million cubic feet (MMcf) during the winter. Additionally, Pipeline Company provides 78.4 Bcf of annual transportation service on a long-term basis in conjunction with storage service provided to other non-affiliated companies by Storage Company and MCGC.

The gas involved in the above transportation and storage service activities is owned by the companies served at the time service is rendered.

Customers. Pipeline Company's transportation customers are shown in Appendix Tab 3, pp. 312-312r. Appendix Tab 3, p. 512A shows Pipeline Company's storage customers. The

service contracts with these customers are usually negotiated in Michigan, where Pipeline Company has its offices and in other states where the customers have their offices.

Regulation. Pipeline Company is a "natural gas company", as that term is defined in the Natural Gas Act ("NGA"), 15 USC §§717, *et seq.* Pipeline Company is subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission ("FERC"), [-10-] which has jurisdiction over all of Pipeline Company's transportation, storage, sales (for resale), rates and charges, construction of new facilities, extension or abandonment of service and facilities, and certain other matters. This jurisdiction includes the authority to review and consider specific long-term financing plans for particular construction projects. See Appendix, Tab 18, for FERC rules regarding review of financing information in certificate matters and Tab 19 in rate matters. Where required, Pipeline Company holds certificates of public convenience and necessity issued by the FERC covering its existing facilities. FERC filings to obtain certification and to establish initial rates and charges are required for any significant expansion of the company's facilities or services. However, no filings with FERC are necessary for short-term financing or for financing other than construction.

Because Pipeline Company does not use any of its facilities in, or otherwise engage in, any local or intrastate natural gas operations of any kind, the MPSC does not exercise general regulatory jurisdiction over any of the company's facilities or operations. And, because all of Pipeline Company's natural gas operations are interstate in nature, the FERC does exercise general regulatory jurisdiction over the company's facilities and operations. [-11-]

Pipeline Company must obtain certificates of public convenience and necessity from the MPSC if and when it seeks to use state condemnation laws to acquire property for use as a

gas storage field. As a precondition for condemning property interests under state condemnation law to develop its Capac and Muttonville gas storage fields in St. Clair County, Michigan Wisconsin Pipe Line Company (MW), now ANR Pipeline Company, applied to the MPSC for the certificate required by the condemnation statute being used. After public hearings in a contested case, the MPSC granted MW's request by orders of December 29, 1975 in Case No. U-4818 and September 9, 1974 in Case No. U-4485. In the latter case, an application for rehearing by landowners in the field was denied in an order dated October 21, 1974. In both orders, the MPSC asserted that it retained jurisdiction and continuing supervision over the development and operation of the fields.

The MPSC has also exercised authority over securities issued by Pipeline Company since it was established, except for the period 1970-1979. During the 1970's, following the Court of Appeals decision in *Great Lakes Gas Transmission Co.* v *MPSC*, 24 Mich App 77 (1970), the MPSC advised Pipeline Company (then Michigan Wisconsin Pipe Line Company) that, pursuant to the advice of their legal division, the MPSC concluded that security issuances of Michigan Wisconsin were not subject to consideration by the [-12-] commission under PA 1909, 144. Upon advice of the MPSC secretary, Plaintiffs did not file securities applications after 1970. After *Michigan Gas Storage Co.* v *MPSC*, 405 Mich 376 (1979) securities applications were again filed.

Since 1979, Pipeline Company has received approval of all seven of its applications. The longest time for approval was slightly over eight months on one application. The other six approval times were between three and six weeks. All approvals granted authorization to issue and sell the amount and kind of securities requested.

However, on June 8, 1982, Pipeline Company filed an application for approval of certain proposed security issuances

which included guaranteeing certain financing by a subsidiary company. Instead of promptly approving the application as it had done in the past, the MPSC issued a "Notice of Inquiry" and set the matter for hearing commencing August 19, 1982. Pipeline Company concluded that the MPSC was concerned about the guarantee of financing by a subsidiary, and the original application was withdrawn. Thereafter, a substitute application, which omitted the guarantee, was filed, and the substitute application was approved on March 31, 1983.

The seven applications filed and approved after 1979 raised the issue of MPSC jurisdiction, but the issue was not [-13-] litigated until now. After the opinion in *Western Union* v *MPSC*, 127 Mich App 89 (1983) was issued, Plaintiffs decided to litigate the issue.

Sales of debt and equity securities in public or private transactions must be made in conformity with the federal securities statutes, rules and regulations which require that certain information be provided or made available to investors.

Public sales of securities can be made only after the SEC is satisfied that the requisite information about the Company and the securities it proposes to sell will be provided to investors.

To that end, registration statements must be filed with the SEC. The registration statements contain information about the company's financial condition, its capital structure and the use it intends to make of the proceeds from the sale of securities to be registered. Upon the satisfaction of the statutory and regulatory disclosure requirements, the registration statements become effective.

Transactions which do not involve sales to the public nonetheless entitle investors to material information, affording them protection against fraudulent and manipulative practices.

In certificate cases, the FERC reviews the applicant company's plans to finance the proposed facilities, including issuance of securities if proposed. If it deems it appropriate, [-14-] the FERC may impose specific conditions on financing, as it did in the case of Storage Company Docket Nos. RP-66 and RP 81-41. There, the FERC, among other things, set limits on the amount of interest that Storage Company could recover on short-term debt and set a date by which Storage Company must obtain long-term fixed-rate financing.

In the event of rising interest rates, delay in approval of a security issuance can result in the actual cost of debt exceeding the cost used by the FERC in establishing rates.

Capital Resources. The natural gas industry is highly capital intensive. Due to the relatively predictable nature of Pipeline Company's pattern of sales and rates, including the normally predictable seasonal pattern of gas sales, the company can predict its cash flow on a reasonably accurate basis and thus determine its need for external financing. Normally, short-term debt is utilized to finance the build-up of gas storage balances until the heating season begins (after which time substantial cash is generated as gas is withdrawn from storage and sold) and to finance capital expenditures pending long-term financing. [-15-]

Various forms of long-term financing are used to fund the construction of natural gas transmission and storage facilities, including pipelines and appurtenances, compressor facilities, and necessary gas measuring and metering facilities. This financing is accomplished by the issuance and sale of a variety of securities, including common and preferred stock, first mortgage bonds, debentures and unsecured notes. One form of financing sometimes available for selected construction projects is "project financing", whereby a pipeline company obtains an advance determination and commitment from the FERC regarding the rates that will apply to a project, and the

income from these rates is then committed to the timely retirement of the project loan, thus providing the lender with an effective form of repayment security. Project financing is sometimes used when the debtor's equity is relatively small in comparison to the total debt required. Neither Pipeline Company nor Storage Company have used, or have immediate plans to use, project financing. See Appendix, Tabs 16 and 17, for examples of FERC handling of "project financing".

Capital expenditures and financing plans are subject to management's continuous review and revision in light of gas purchase obligations, available gas supplies, construction requirements, availability of funds, and changing business, economic, [-16-] regulatory and other conditions and developments. According to current projections, Pipeline Company may issue approximately 50 million dollars in securities, not including potential refunding of debts, during 1986 and approximately 100 million dollars during 1987. The proceeds from such securities issuances will be used to assist in financing construction requirements of approximately 560 million dollars. Of this total, some 50 million dollars are expected to be used for facilities constructed in the state of Michigan. FERC filings and certifications will be required for these projects. Other than the projections discussed above, Pipeline Company has no immediate plans to issue any new securities.

STORAGE COMPANY

Business. Storage Company was organized in 1978 to develop and operate gas storage reservoirs to store gas for nonaffiliated customers. Storage Company is authorized by its Articles of Incorporation to engage in an activity within the purposes for which corporations may be organized under the Business Corporation Act of Michigan. Storage Company does not sell natural gas.

Facilities. Four storage fields in the northern portion of Michigan's lower peninsula have been developed and are in operation. They are Cold Springs 12, Cold Springs 31, Excelsior 6 [-17-] and Rapid River 35; all in Kalkaska County. These fields are connected to Great Lakes Transmission Company's (Great Lakes) transmission pipeline in Crawford County by approximately 24 miles of Storage Company's underground storage lines described in Appendix Tab 4, p. 511. Maps illustrating Storage Company's facilities are contained in the Appendix, Tab 8.

Storage Company has approximately 53 Bcf of working storage capacity in Michigan, of which approximately 50 Bcf has been contracted to customers on a long-term basis. Storage Company used 2.3 Bcf of the remaining working storage capacity to provide short-term storage service, and Storage Company is presently looking to market additional storage service to fully utilize such additional working storage capacity.

Southwest Gas Storage Company, formed by a subsidiary of Storage Company called ANR Western Storage Company and a subsidiary of Panhandle Eastern Pipeline Company ("Panhandle"), placed into operation on April 1, 1982, a storage project in Kansas which provides gas storage service from a working storage capacity of 35 Bcf. Panhandle has contracted on a long-term basis for all of the storage service capacity available from this project.

Storage Company's present plans include arranging for an additional 15.7 Bcf of storage capacity in Michigan. Other than [-18-] the above expansion, Storage Company plans to compete for whatever additional gas storage service is required by the gas companies making up our national natural gas transportation and distribution network. The company also plans to develop and finance whatever additional gas storage capacity may be needed to meet such requirements.

Operations. Storage Company summertime operations consist of receiving natural gas from Great Lakes delivered by displacement* for the account of Storage Company's customers. The gas is stored in one or more of Storage Company's four gas storage fields and is redelivered on demand within contractual entitlement to Great Lakes for the account of the storage customer. Physically, the gas received and injected into storage is produced in western Canada and the gas withdrawn and redelivered rejoins the gas stream flowing in Great Lakes' pipeline toward eastern Canada.

However, all of the gas stored is supplied outside of Michigan by Storage Company's customers for transmission to Storage Company's facilities by displacement or otherwise. And, upon withdrawal [-19-] from storage, these volumes of gas are transmitted by displacement, or otherwise, back to Storage Company's customers for use outside the state of Michigan.

Great Lakes Involvement. Great Lakes operates a natural gas pipeline across the northern portions of Minnesota, Wisconsin, the upper peninsula of Michigan, the Straits of Mackinac, and down through the lower peninsula of Michigan to the Canadian border at St. Clair, to transport gas to Canada's eastern markets and to import a portion of the gas into the United States.

ANR and TransCanada Pipelines, Ltd. ("TransCanada"), Canada's largest pipeline company, agreed to form Great Lakes Gas Transmission Company ("Great Lakes"), a Delaware corporation, to build and operate a pipeline system. ANR and TransCanada each own 50% of the stock of Great Lakes. Great Lakes is a natural gas company under the NGA. The Great Lakes pipeline is utilized by Storage Company's

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* Displacement is the commonly employed practice among pipeline companies of exchanging equivalent volumes of gas at a mutually convenient place in lieu of actual physical delivery of the storage gas.

customers to transport their gas to and from Storage Company facilities. See Appendix, Tab 8.

Storage and Transportation. Storage Company has storage charges which have been approved by FERC for the services described above. Those charges include the cost associated with transporting the gas to and from Great Lakes' transmission line through Storage Company's pipelines to and from the storage fields themselves. [-20-] Storage Company has no separate transportation tariffs approved by FERC and does not offer discrete transportation services as does Pipeline Company.

In addition to the storage fields and the storage lines described above, Storage Company has three compressor stations and associated facilities for injecting and withdrawing the gas. All these facilities are located in Michigan. Storage Company takes possession of the gas and relinquishes possession at the interconnection between its pipeline and the Great Lakes' transmission lines at Deward, Michigan.

Storage Company is not an integral and essential part of Pipeline Company's operations. Storage Company does not provide storage service to or for Pipeline Company, nor was it established to do so. Storage Company's reservoirs and facilities are not engineered or used as pressure apparatus in, nor are they necessary to, the proper operation of Pipeline Company's system operations. The characteristics of each company's operations do not become considerations in the other's decision to purchase, transport, sell or store gas for their customers.

Though both businesses are separate and independent, they complement one another. Both can be said to perform important functions in the national pipeline and storage network. [-21-]

Customers. Storage Company's seven customers are shown on page 10 of the Complaint. The service contracts with these

customers are usually negotiated in Michigan where Storage Company has its offices, and in the state where the customers has its offices.

Six of Storage Company's customers use(d) Pipeline Company to transport their gas to Storage Company facilities. None required storage service as a condition of purchasing transportation, but all purchased transportation in order to use the storage service.

None of Storage Company's customers purchased their stored gas from Pipeline Company. All but one used Pipeline Company to transport their gas both to and from Storage Company facilities, and that one customer used Great Lakes to transport its gas to and from Storage Company facilities.

Regulation. Plaintiffs take the view, and the FERC has found in its orders, that like Pipeline Company, Storage Company is a "natural gas company", as that term is defined in the NGA and that FERC has broad jurisdiction over both companies as to transportation, storage and sales (for resale), rate and charges, construction of new facilities, extension or abandonment of service and facilities, and certain other matters including financing. See Appendix, Tab 13, p. 24 and Tab 4 cover [-22-] sheet. Their view is that FERC's jurisdiction includes the authority to review and consider specific financing plans for a particular project. See Appendix, Tabs 16 through 19, 23.

Defendants, on the other hand, take the view that the FERC does not have jurisdiction over Storage Company, even though FERC presently exercises such authority. Their view is that FERC has no jurisdiction, because gas storage is not within the ambit of sale or transportation of natural gas in interestate commerce. Defendants believe that Storage Company is not a natural gas company under the NGA and that the NGA does not apply, because Storage Company does not

sell or transport gas in interstate commerce. However, Defendants admit that the FERC does, and the MPSC does not, exercise general regulatory jurisdiction over the facilities and gas operations of Storage Company. See Appendix, Tabs 13 through 15, for FERC docket matters involving Storage Company, and see Appendix, Tab 4.

No dispute exists that, where required, both companies hold certificates of public convenience and necessity issued by the FERC covering their existing facilities and services. Likewise, any significant expansion of facilities or service by either company will require a FERC filing for certification and the establishment of appropriate rates and charges. [-23-]

The MPSC has also exercised authority over securities issued by Storage Company continuously since 1979. During that time, Storage Company received approval of all three of its applications, in time periods ranging from three to six weeks. All approval granted the full substantive relief requested and were unconditional.

However, on October 14, 1980, Storage Company applied for approval of securities in MPSC Case No. U-6637. On October 31, 1980, after having been advised by MPSC representatives that hearings would be held, Storage Company withdrew its application, and on September 9, 1981, the MPSC approved the withdrawal. Thereafter, on October 9, 1981, after a settlement had been reached with the MPSC regarding ANR's divestiture of MCGC, Storage Company filed a substitute application which was approved by the MPSC on November 24, 1981.

All three applications filed and approved after 1979 raised the issue of MPSC jurisdiction, but the issue was not litigated until now. After the opinion in *Western Union* v *MPSC*, 127 Mich App 89 (1983) was issued, and because no new security issuances were immediately contemplated, Plaintiffs decided to litigate the issue. [-24-]

Capital Resources. Because the natural gas industry is highly capital intensive, the issuance of various forms of securities is also an essential aspect of Storage Company's business activity.

Like Pipeline Company, Storage Company's financing plans are subject to management's continuous review and revision in light of the availability of funds and changing business, economic, regulatory and other conditions and developments. Storage Company may issue 27 million dollars in securities during 1987. Otherwise, Storage Company has no present plans to issue any new securities.

The National Pipeline and Storage Network. Through a complex network of facilities and gas handling methods, the various pipelines and storage facilities (including those of Storage Company) can be effectively interconnected. See Appendix, Tab 5, for map of national interstate pipeline system. Gas volumes taken into the network in any one area of the country can be shifted to other areas of the country where the gas may be needed. Storage facilities connected to this network facilitate input of newly-produced gas into the network in spite of fluctuating seasonal demands for gas, with the excess production being placed in storage during periods of low demand and with storage gas being withdrawn to supplement pipeline shipments during periods of high demand. [-25-]

The FERC regulates the various companies whose facilities and services make up the network, including the companies that provide the storage facilities. The FERC issues certificates of public convenience and necessity for development and/or combining of facilities and services relative to making gas available in sufficient quantities when and where it is needed nationwide.

MARKETING OF SECURITIES BY BOTH PLAINTIFFS

Both Plaintiffs use national and international financial markets to issue and sell their securities. The usual procedure employed to obtain capital is to hire an international Wall Street investment banker, such as Solomon Brothers or Goldman Sachs, and ask the investment banker to raise the required funds in as advantageous a manner as possible. In turn, the investment banker explores the international and national financial markets, determines the most advantageous method and source of raising the required funds and proceeds with the issuance and marketing of the securities. In some cases, however, the financing has been obtained directly with national or international banks. In all cases, Michigan investors are involved with these security issuances only to the extent they operate and invest in these international and national financial markets. Accordingly, it is anticipated that Michigan investors will never own more than a small percentag. of Plaintiffs' outstanding securities. [-26-]

PROCEDURE BEFORE THE COURT

It is agreed by the parties that the Court shall forthwith proceed to fully and finally adjudicate and determine the claim and issues raised by Plaintiffs' amended complaint, in the same manner as if on motions for summary judgment by both sides, after the parties have presented their respective positions in briefs and oral arguments before the Court.

APPENDIX TO STIPULATION OF FACTS

The below-listed materials, which will be presented to the Court in the form of an Appendix to this Stipulation of Facts,

shall constitute part of the record to be considered by the Court in determining its judgment in this case. However, the stipulation of the parties as to the materials included at Tabs 10 through 22 is limited to agreement that they represent true copies of authentic documents on public record.

APPENDIX

Tab	Document
1	ANR Form 10-K (1983)
2	Pipeline Company Form 10-K (1983)
3	FERC Form 2 (Pipeline Company) (1983)
4	FERC Form 2 (Storage Company) (1983)
5	Map of national interstate gas pipeline system (Exhibit C of Complaint)
6	Pipeline Company System Map (Exhibit A of Complaint) [-27-]
7	Dollar value of Pipeline Company facilities located in each state where doing business
8	Storage Company System Maps (3 maps)
9	Portion of Pipline Company's Certificate of Incorporation relating to company's authority.
10	MPSC Order of March 5, 1981
11	MPSC Order of August 10, 1981
12	MPSC Order of December 1, 1981
13	Storage Company FERC Order of July 23, 1979
14	Storage Company FERC Order of August 22, 1980
15	Storage Company FERC Settlement Proposal and approval letter of September 18, 1981
16	FERC Trailblazer opinion and order
17	FERC Ozark opinion and order
18	FERC regulations re: Certification
19	FERC regulations re: Rates
20	Ingham County Circuit Court Injunctive Order
21	MPSC settlement and order in divestiture proceeding
22	FERC El Paso Opinion

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By /s/ R. PHILIP BROWN
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Dated: 1-11-85

[-28-]

MIKA, MEYERS, BECKET & JONES
Attorneys for Plaintiffs

By /s/ JOHN C. JONES mgb

Business Address:
500 Frey Building
Grand Rapids, MI 49503
(616) 459-3200

Dated: January 11, 1985

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 1983

Commission File Number 1-7531

AMERICAN NATURAL RESOURCES COMPANY
(Exact name of registrant as specified in its charter)

Delaware
(State or other jurisdiction of incorporation or organization)

13-5553550
(I.R.S. Employer Identification No.)

One Woodward Avenue, Detroit, Michigan
(Address of principal executive offices)

48226
(Zip Code)

Registrant's telephone number, including area code:
(313) 965-1200

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Name of each exchange on which registered
Common Stock, par value $1 per share	New York Stock Exchange The Stock Exchange, London

Securities registered pursuant to Section 12(g) of the Act:
None

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes X No ____

The aggregate market value of the common stock held by nonaffiliates at March 7, 1984 was $1.145 million based on the New York Stock Exchange — Composite Transactions closing price on that date.

Indicate the number of shares outstanding of each of the registrant's classes of common stock, as of the latest practicable date.

Class	Outstanding at March 7, 1984
Common Stock, par value $1 per share	24,738,828

Documents Incorporated by Reference.

Document	Part of Form 10-K
Portions of 1984 Proxy Statement	Part III
Portions of 1983 Annual Report to Stockholders	Parts II and IV

PART I

ITEM I. BUSINESS

GENERAL

ANR is a diversified holding company with five principal lines of business: Natural Gas, Exploration and Production, Trucking, Coal and New Energy Technology. See Note 12 of the Notes to the Financial Statements for financial information about ANR's lines of business.

ANR was initially organized in 1901 and is now a Delaware corporation. References herein to ANR include the present company and its predecessors. At December 31, 1983, ANR and its subsidiaries had 11,174 employees, of whom about 5,000 in Trucking were represented under a collective bargaining agreement which expires March 31, 1985. Comprehensive benefit plans are available to employees.

Natural Gas. ANR Pipeline is engaged in the interstate transportation, storage, purchase, exchange and sale of natural gas. Gas is transported through ANR Pipeline's facilities from areas in Texas, Oklahoma, Louisiana and the Gulf of Mexico to its distribution customers in nine states. Gas from Canada and western states is received through interconnections with other pipeline companies. Subsidiaries of ANR Pipeline and four other pipeline companies are equal partners in HIOS, a general partnership which owns a major offshore gas pipeline system in the Gulf of Mexico which is operated by ANR Pipeline. Storage Company and a partnership, in which a subsidiary of Storage Company has a 50% interest, provide a total of 85 Bcf of long-term storage service to non-affiliated pipeline and distribution companies. ANR also owns 50% of the common stock of Great Lakes, another interstate gas transportation company. Financial Statements and statistics used in this report do not include Great Lakes unless specifically noted. [4]

• • •

Storage Company

Storage Company was organized in 1978 to develop and operate gas storage reservoirs to store gas for non-affiliated customers. Two storage fields in the northern portion of Michigan's lower peninsula with combined working storage capacity of 38 Bcf were placed in operation in 1980. In 1981, two additional storage fields in northern Michigan were placed in operation with combined working storage capacity of 12 Bcf, which was increased to 15 Bcf in 1982.

Of the 53 Bcf of storage capacity in Storage Company's four fields, 50 Bcf has been contracted to customers on a long-term basis. The contracts related to 38 Bcf of such capacity will expire in 1995. Other contracts for the remaining 12 Bcf will expire in 2003. After their scheduled termination dates, each of the contracts will be extended for consecutive 12

month periods unless terminated upon 12 months notice by either party.

A partnership formed by subsidiaries of Storage Company and Panhandle placed into operation on April 1, 1982 a storage project in Kansas which has a working storage capacity of 35 Bcf. Panhandle has contracted on a long-term basis for all the storage service available from this project.

During June, 1983 Storage Company filed an amended application with the FERC to provide 10 Bcf of new storage service to Transcontinental Gas Pipe Line Corporation (Transco) in connection with Transco's proposal to import gas from Canada at Niagara Falls. The amended application reflects a 50% reduction in storage service due to a similar reduction in gas volumes approved for export to Transco by the NEB. In October 1983 Couch Gas Storage Company (Couch Gas) filed a competitive application with the FERC to provide the storage service to Transco from a storage field proposed to be developed in southern Michigan. Storage Company has agreed in principle with Couch Gas to form a partnership to provide the 10 Bcf of storage service to Transco.

* * *

[11]

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 1983

Commission file number 1-7320

ANR PIPELINE COMPANY
(Exact name of registrant as specified in its charter)

Delaware
(State or other jurisdiction of incorporation or organization)

38-1281775
(I.R.S. Employer Identification No.)

500 Renaissance Center, Detroit, Michigan
(Address of principal executive offices)

48243
(Zip Code)

Registrant's telephone number, including area code:
313-496-0200

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Name of each exchange on which registered
8⅝% First Mortgage Pipe Line Bonds, due 1993	
9⅝% First Mortgage Pipe Line Bonds, due 1994	
10⅝% First Mortgage Pipe Line Bonds, due 1995	New York Stock Exchange
13¼% Debentures, due 1997	
11¾% Debentures, due 1997	
$2.675 Series, Cumulative Preferred Stock, $1 par value	
$2.12 Series, Cumulative Preferred Stock, $1 par value	

Securities registered pursuant to Section 12(g) of the Act:
None

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to filed such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes X No ____

Indicate the aggregate market value of the voting stock held by non-affiliates of the registrant.

No voting stock is held by non-affiliates of the registrant.

Indicate the number of shares outstanding of each of the registrant's classes of common stock, as of the latest practicable date.

Class	Outstanding at February 29, 1984
Common stock, par value $100 per share	3,895,250 shares

Documents Incorporated by Reference.
None

PART I

ITEM 1. BUSINESS

General

ANR Pipeline Company is a Delaware corporation organized in 1945. All of the Company's outstanding common stock is owned by ANR. On January 1, 1984, the name of the Company was changed from Michigan Wisconsin Pipe Line Company to ANR Pipeline Company.

In 1982, the Company's gas and oil properties and related net assets were transferred to Production Company as a contribution to its capital, subject in part to FERC approval. In early 1983 Production Company paid a dividend to the Company equal to the net book cost of such properties and assets reduced by the related liabilities and deferred income taxes. In 1983 ANR Pipeline paid a dividend to ANR of all the stock of Production Company as a result of which Production Company is no longer a subsidiary of the Company. See Note 2 of the Notes to the Financial Statements.

The Company owns and operates a natural gas pipeline system supplying gas to 51 gas distribution customers in Michigan, Wisconsin, Illinois, Indiana, Iowa, Kansas, Missouri, Ohio and Tennessee. While the Company's revenues are derived principally from the sale of gas, it also provides storage and transportation services for other gas systems. Offshore Company and subsidiaries of four other pipeline companies are partners in HIOS, a general partnership, which owns a major offshore gas pipeline system in the Gulf of Mexico, which is operated by the Company.

During 1983, approximately 86% of the Company's gas supply was purchased from numerous independent producers in Kansas, Louisiana, Mississippi, Oklahoma, Texas, Wyoming and the Texas and Louisiana offshore areas; the balance was obtained from Great Lakes and five non-affiliated pipeline suppliers — Midwestern, Northern Natural, Texas Gas, TransCanada and ProGas. The Company's two interconnected large-diameter multiple line systems transport gas to the Midwest from (1) the Hugoton Field and other fields in the Anadarko Basin in Texas and Oklahoma and (2) the Louisiana onshore and Louisiana and Texas offshore areas. Gas from Wyoming is obtained by the Company only through exchange agreements with other companies.

The Company operates its pipeline facilities in conjunction with an extensive underground gas storage system in Michigan. When pipeline deliveries are greater than customers' requirements, gas may be placed in the storage fields for withdrawal to meet winter loads.

Sales

During 1983, the Company sold 555 Bcf of gas to its customers, of which approximately 72% was sold to its three largest customers: Michigan Consolidated, Wisconsin Gas Company and Wisconsin Natural Gas Company. Michigan Consolidated serves the City of Detroit and certain surrounding areas, the industrial cities of Grand Rapids and Muskegon, the communities of Ann Arbor and Ypsilanti, and numerous other communities in Michigan. Wisconsin Gas Company serves the Milwaukee metropolitan area and numerous other communities in Wisconsin. Wisconsin Natural Gas Company serves the industrial cities of Racine, Kenosha, Appleton and surrounding areas in Wisconsin.

The Company sells gas pursuant to long-term service agreements under demand-commodity rate schedules. The demand component of the Company's rates is related to the maximum daily volume of gas to which the customer is entitled and it must be paid regardless of the volume of gas purchased. The commodity component of the Company's rates consists of two elements: (1) a charge for the cost of gas, and (2) a charge for non-gas costs. Both elements apply to each unit of gas sold to all customers except that Michigan Consolidated pays a fixed annual charge for the non-gas costs. Relatively minor volumes are sold under other rate schedules. [4]

Gas sales by the Company to its customers are shown in the following table:

	Sales in MMcf(1) Year Ended December 31,		
	1981	1982	1983
MICHIGAN			
Michigan Consolidated ..	286,690	209,044	247,466
Michigan Gas Utilities Company	18,594	19,627	17,533
Michigan Power Company	15,568	14,910	13,195
WISCONSIN			
Wisconsin Gas Company	110,332	106,182	96,851
Wisconsin Natural Gas Company	67,728	64,855	58,143
Wisconsin Public Service Corporation	47,847	48,138	42,960
Wisconsin Power and Light Company	22,446	22,086	21,465
Madison Gas and Electric Company	16,072	16,522	16,806
Wisconsin Fuel and Light Company	14,574	14,364	13,326
OTHER CUSTOMERS IN WISCONSIN, ILLINOIS, INDIANA, IOWA, KANSAS, MISSOURI, OHIO, TENNESSEE AND WYOMING	44,232	32,691	27,708
Total(2)	644,083	548,419	555,453
Average revenue per Mcf ...	$3.38	$4.16	$4.49

(footnotes on next page)

(footnotes continued from previous page)

NOTES:

(1) All gas volumes set forth in this Annual Report are expressed at a measuring base of 14.73 pounds per square inch absolute and 60 degrees Fahrenheit.

(2) The decline in sales from 644,083 MMcf in 1981 to 548,419 MMcf in 1982 was primarily the result of fuel conservation by gas customers, conversion from gas to coal and residual oil by certain industrial users and a decline in Michigan Consolidated's interstate sales. In 1983, Michigan Consolidated's increased interstate sales more than offset the reduction in the Company's sales to its other customers.

Factors Affecting Markets

Natural gas competes with other forms of energy available to customers, primarily on the basis of rates which are generally lower than the costs of competitive fuels other than coal and No. 6 fuel oil for certain industrial users. However, changes in the price or availability of natural gas or other forms of energy as well as business conditions, energy conservation, well head gas pricing provisions of the NGPA, legislation or regulations affecting energy price or uses, changes in rates for different classes of customers, conversion to alternate fuels, taxes on gas and other factors may affect the demand for sales of natural gas in the market areas served by the Company. Sales may also be significantly affected by weather conditions during the heating season.

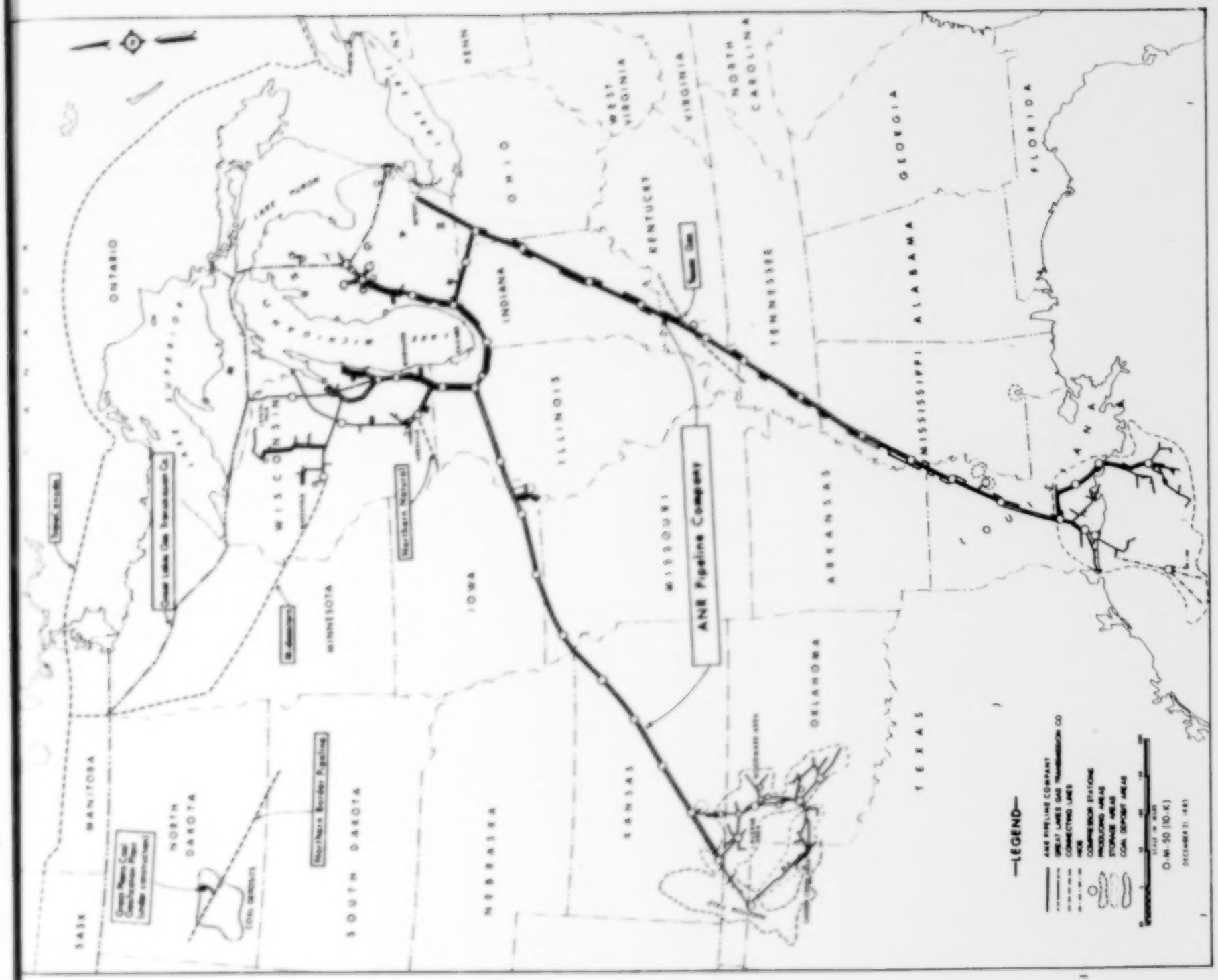
Storage and Transportation Services

The Company transported, under long-term agreements with non-affiliated pipeline companies, an aggregate of 795 MMcf of gas per day in 1983, compared to 792 MMcf of gas per day in 1982, from points in the Gulf of Mexico to onshore locations in southern Louisiana. In 1983, the Company also transported an average of 201 MMcf per day to the Chicago and mid-Indiana areas from the Great Lakes pipeline in

Michigan. Short-term transportation service aggregating 138 Bcf was provided for others in 1983, compared to 18 Bcf in 1982.

Underground storage service of up to 28.7 Bcf of gas is provided by the Company for other gas companies on a long-term basis. Customers' gas delivered to the Company during the summer is redelivered to them at daily rates of up to 315 MMcf during the winter.

Additionally, transportation service of 78.4 Bcf is being provided annually on a long-term basis in conjunction with storage service for other gas companies provided by Michigan Consolidated and Storage Company. [5]



BEST AVAILABLE COPY

ITEM 2. PROPERTIES

The Company's two interconnected large-diameter multiple pipeline systems transport gas to the Midwest from the Hugoton Field and other fields in the Anadarko Basin in Texas, Oklahoma and from the Louisiana onshore and Louisiana and Texas offshore areas. The Company's offshore system in the Gulf of Mexico consists of 870 miles of pipeline with 76,000 installed horsepower at one major compressor complex and twenty-seven smaller installations.

The Company's principal facilities on December 31, 1983 consisted of the following:

	Number of Compressor Stations	Installed Horsepower	Number of Purchase Stations	Number of Sales Stations
Owned and operated	70	985,431	1,535	255
Operated under lease	3	62,505	—	13
Owned by the Company and operated by others	30	28,532	—	—
Total	103	1,076,468	1,535	268

	Number of Miles			
Diameter of Pipe	Owned and Operated	Operated Under Lease	Owned in Part and Operated by Others	Total
30" through 42"	3,407	—	30	3,437
20" through 26"	3,193	89	37	3,319
18" and smaller	4,822	185	151	5,158
Total	11,422	274	218	11,914

Gross additions to gas transmission plant for the three years ended December 31, 1983 amounted to $231.2 million in 1981, $177.2 million in 1982 and $44.6 million in 1983.

Retirements during the three year period amounted to $32.5 million.

The Company's underground storage system consists of fifteen storage fields (together with dehydration, measuring, compressor and gas transmission facilities) in Michigan, eight of which are leased. The aggregate working storage capacity of the system is approximately 190 Bcf, with a capacity to deliver 1,984 MMcf on a peak day at the end of February and larger volumes prior to that date. The storage field leases expire on May 1, 1998. The Company has the option to extend each of the leases for up to three successive five year periods. More storage can be developed in other depleted oil and gas fields in Michigan as required, with FERC approval.

As of January 1, 1984, the Company's total gas volume in its underground storage fields in Michigan was approximately 231 Bcf, which consisted of about 104 Bcf of base gas and 127 Bcf of current or working gas. Four Bcf of the base gas and 17 Bcf of the working gas were held for the account of other companies. Additionally, as of January 1, 1984, the Company had 29 Bcf of gas stored in off-system storage fields.

Substantially all of the Company's pipelines cross privately owned property under easements obtained from the apparent record owners, in some cases without joinder of all apparent record owners in the grants. In a number of instances these easements may be subject to mortgages or other liens to which the Company is not a party, and in some cases it may become necessary for the Company to deal with mortgagees or adverse title claimants to protect its claim to easements. Permits from appropriate authorities or owners have been obtained covering the pipeline crossings over or under rivers and pipeline laid along or across public lands, the outer Continental Shelf, highways and railroad rights-of-way. In most instances such permits are revocable or cancellable at the grantor's election and in many cases require nominal or other periodic payments.

The real property owned by the Company in fee consists principally of sites for compressor and metering stations and microwave and terminal facilities. With respect to the seven owned storage fields, the Company holds title to gas storage rights representing ownership of, or has long-term leases on, various subsurface strata and also holds certain additional gas rights. Under the Natural Gas Act the [13] Company may acquire by the exercise of the right of eminent domain, through proceedings in United States District Courts or in state courts, necessary rights-of-way to construct, operate and maintain pipelines and necessary land or other property for compressor and other stations and equipment necessary to the operation of pipelines. All of the principal properties of the Company are and will be subject to the lien of its Mortgage and Deed of Trust dated as of September 1, 1948, securing its First Mortgage Pipe Line Bonds, and some of such properties are or may be subject to "permitted liens" as defined in such Mortgage and Deed of Trust.

* * *

[14]

ITEM 7. MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

Capital Resources and Liquidity. The natural gas pipeline industry is highly capital intensive. Expenditures for each of the years 1981 through 1983 and the sources of capital used to finance those expenditures are summarized in the Consolidated Statements of Source of Funds for Capital and Other Expenditures.

Due to the normally predictable seasonal pattern of gas sales to customers and the rate regulations that govern determination of resale prices, the Company can predict its cash

flow on a reasonably accurate basis and thus effectively determine its needs for external financing. Normally, short-term debt is utilized to finance the build-up of gas storage balances until the heating season begins (after which time substantial cash is generated as gas is withdrawn from storage and sold) and to finance capital expenditures pending permanent financing. During 1983 as a result of declines in gas transmission plant construction and in expenditures for non-current gas in storage from the prior year, internally generated funds have generally been sufficient to finance these acitvities. During 1983 the Company repaid $177.2 million of short-term borrowings outstanding at year end 1982 with the proceeds from winter sales.

In 1982 the Company purchased and stored 35 Bcf ($101.9 million) of gas for delivery to its customers in future years. In 1983 6 Bcf were withdrawn and delivered to customers. The remaining portion, 29 Bcf ($85.1 million), will be delivered in future years. The Company made payments aggregating $86.6 million for take-or-pay incurred in 1982 under gas purchase contracts with suppliers and deferred $70.6 million of similar obligations. During 1983 an additional $105.7 million of take-or-pay obligations has been incurred, $43.8 million has been repaid by producers and $83.7 million has been deferred (see Note 4 of Notes to Financial Statements). Take-or-pay expenditures for 1984 are currently estimated at $86 million. This amount, however, could be reduced if the Company is successful in its pursuit of reductions in gas purchase obligations with domestic producers. Additionally, the extent of future expenditures for take-or-pay and for storage of gas for future delivery will depend on other uncertainties, including: weather; the state of the economy; rate design modifications which could result in more competitive pricing of gas for large industrial users; the intepretation and enforceability of, or the willingness of producers to renegotiate, contract quantity provisions; alternative approaches to handle take-or-pay; and possible legislation by the Congress. It is estimated that

construction expenditures will approximate $110 million for 1984; certain commitments applicable to the construction program have been made.

The Company will continue to utilize various capital sources as appropriate to finance costs incurred in connection with gas transmission plant construction, take-or-pay expenditures and purchases of gas for future delivery. At December 31, 1983, the Company had short-term borrowing arrangements aggregating $80 million, with institutional investors at rates not in excess of prime, which were fully utilized as of that date. In February 1984, the Company used excess funds to reduce the amount outstanding to $15 million. In addition, the Company participates in an ANR program which matches short-term cash excesses and requirements of participating ANR companies, thus minimizing total borrowings from outside sources. At December 31, 1983 the Company had loaned $272.7 million to ANR companies under this program. Subsequently, in March 1984, the Company utilized a portion of these excess funds to redeem $75 million of 17¾% Series First Mortgage Pipe Line Bonds due 1991. The Company redeemed the bonds at 112.68% of the principal amount, plus interest from October 1, 1983.

The Company has several alternatives available to finance additional expenditures if required. Under the most restrictive provisions of the Company's Mortgage and Deed of Trust, unused bondable property additions of $785 million were available at December 31, 1983 to support $470 million of new long-term bond financing. Alternatively, the terms of the Company's most restrictive debt covenant would permit the issuance of $840 million of additional debentures. In lieu of bonds or debentures, the Company could issue additional cumulative preferred stock totaling $525 million based upon an assumed dividend rate of 13%. The amount of preferred stock and debentures that may be issued at any time could be reduced if the amount of the Company's debt securities were increased. [16]

Capital expenditures and financing plans are subject to continuous review and revision in light of gas purchase obligations, available gas supplies, availability of funds and changing business, regulatory and other conditions and developments. Management anticipates that its financing requirements during 1984 will be provided by internally generated funds and thus does not anticipate the need for external funding to meet its existing capital obligations. Funding of capital expenditures will be influenced by various factors including the regulatory environment, economic conditions and conditions in the capital markets.

* * *

[17]

Exhibit Number	Regulation S-K Item 601 Reference	Description of Document
		* * *
	(10)	**Material Contracts**
		Gas Purchase Agreements [OMITTED IN PRINTING]
10- 1		
10- 2		
10- 3		
10- 4		
10- 5		
10- 6		
10- 7		

Exhibit Number	Regulation S-K Item 601 Reference	Description of Document
10- 8		
10- 9		
10-10		
		Storage Field Lease Agreements between the Company and Michigan Consolidated
10-11		Lease agreement dated August 31, 1948 (Exhibit 15-K to ANR's Registration Statement No. 2-7800)
10-12		Amendatory agreement dated March 1, 1950 (Exhibit 15-TT to ANR's Registration Statement No. 2-8567)
10-13		Amendatory agreement dated February 28, 1951 (Exhibit 15-N to ANR's Registration Statement No. 2-9003)
10-14		Lease agreement dated as of September 25, 1950 (Exhibit 15-O to ANR's Registration Statement No. 2-9003) [28]
10-15		Lease agreement dated September 25, 1951 (Exhibit 13-F-4 to Michigan Consolidated's Registration Statement No. 2-10282)
10-16		Three amendatory agreements dated January 1, 1962 (Exhibits 4-E-5, -6 and -7 to Michigan Consolidated's Registration Statement No. 2-21082)

Exhibit Number	Regulation S-K Item 601 Reference	Description of Document
10-17		Two lease agreements dated April 13, 1962 (Exhibits 4-E-8 and -9 to Michigan Consolidated's Registration Statement No. 2-21082)
10-18		Lease agreement dated February 13, 1963 (Exhibit 13-S-1 to the Company's Registration Statement No. 2-21500)
10-19		Lease agreement dated July 1, 1964 (Exhibit 13-F-1 to the Company's Registration Statement No. 2-26144)
10-20		Six amendatory agreements dated April 26, 1968 (Exhibits 4-D-12 through 4-D-17, to Michigan Consolidated's Registration Statement No. 2-29659)
10-21		Amendatory agreement dated as of September 1, 1971 (Exhibit 13-F-1 to the Company's Registration Statement No. 2-42256)
10-22		Seven amendatory agreements dated as of August 1, 1973 (Exhibit 13-D-1 to the Company's Registration Statement No. 2-50880)
10-23		Seven amendatory agreements dated as of April 8, 1977 to storage field lease agreements between the Company and Michigan Consolidated (Exhibit 20-4**)

Exhibit Number	Regulation S-K Item 601 Reference	Description of Document
10-24		Letter agreement dated December 23, 1981 providing for amendments to the storage field lease agreements between the Company and Michigan Consolidated (Exhibit 20-1 to the Company's Annual Report on Form 10-K for 1981)
10-25		Seven amendatory agreements dated as of January 1, 1982 to storage field lease agreements between the Company and Michigan Consolidated (Exhibit 19-2 to the Company's Annual Report on Form 10-K for 1982)
		Other Storage Field Lease Agreements
10-26		Limited Term Storage Agreement between Northern Illinois Gas Company and the Company dated as of July 15, 1982 (Exhibit 19-2 to the Company's Registration Statement No. 2-79586)
10-27		Gas Storage Agreement between Consumers Power Company and the Company dated as of August 12, 1982 (Exhibit 19-3 to the Company's Registration Statement No. 2-79586)

* * *

[29]

Form Approved
OMB No. 1902-0028
(Expires 7/31/84)

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FERC FORM NO. 2:
ANNUAL REPORT OF NATURAL GAS COMPANIES
(Class A and Class B)

BEST AVAILABLE COPY

This report is mandatory under the Natural Gas Act. Sections 10(a) and 16, and 18 CFR 260.2. Failure to report may result in criminal fines, civil penalties and other sanctions as provided by law. The Federal Energy Regulatory Commission does not consider this report to be of a confidential nature.

Exact Legal Name of Respondent (Company)	Year of Report
ANR PIPELINE COMPANY (Formerly MICHIGAN WISCONSIN PIPE LINE COMPANY)	Dec. 31, 19 83

Name of Respondent	This Report Is	Date of Report (Mo, Da, Yr)	Year of Report
ANR PIPELINE COMPANY	(1) ☒ An Original (2) ☐ A Resubmission		Dec. 31, 1983

GENERAL INFORMATION

1. Provide name and title of officer having custody of the general corporate books of account and address of office where the general corporate books are kept, and address of office where any other corporate books of account are kept, if different from that where the general corporate books are kept.

Preston D. Hopper, Vice President and Controller
500 Renaissance Center
Detroit, Michigan 48243

2. Provide the name of the State under the laws of which respondent is incorporated, and date of incorporation. If incorporated under a special law, give reference to such law. If not incorporated, state that fact and give the type of organization and the date organized.

Delaware
July 20, 1945

3. If at any time during the year the property of respondent was held by a receiver or trustee, give (a) name of receiver or trustee, (b) date such receiver or trustee took possession, (c) the authority by which the receivership or trusteeship was created, and (d) date when possession by receiver or trustee ceased.

Not Applicable

4. State the classes of utility and other services furnished by respondent during the year in each State in which the respondent operated.

During the year 1983 Respondent was engaged in the purchase, storage, exchange and transportation of natural gas for the resale market. Sales for resale were made in Illinois, Indiana, Iowa, Kansas, Michigan, Missouri, Ohio, Tennessee, Wisconsin and Wyoming. Storage services were rendered in Michigan and exchange and transportation services were rendered in Illinois, Indiana, Kansas, Kentucky, Louisiana (onshore and offshore), Michigan, Mississippi, Ohio, Oklahoma, Tennessee, Texas, Wisconsin, Wyoming and Federal Waters.

5. Have you engaged as the principal accountant to audit your financial statements an accountant who is not the principal accountant for your previous year's certified financial statements?

(1) ☐ Yes. Enter the date when such independent accountant was initially engaged _____
(2) ☒ No.

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Name of Respondent	This Report Is	Date of Report (Mo, Da, Yr)	Year of Report
ANR PIPELINE COMPANY	(1) ☒ An Original (2) ☐ A Resubmission		Dec. 31, 1983

CONTROL OVER RESPONDENT

1. If any corporation, business trust, or similar organization or combination of such organizations jointly held control over the respondent at end of year, state name of controlling corporation or organization, manner in which control was held, and extent of control. If control was in a holding company organization, show the chain of ownership or control to the main parent company or organization. If control was held by a trustee(s), state name of trustee(s), name of beneficiary or beneficiaries for whom trust was maintained, and purpose of the trust. If other companies are controlled by the organization which holds control over the respondent, list the names of such companies and the kind of business each is engaged in.

2. If the above required information is available from the SEC 10-K Report Form filing, a specific reference to the report form (i.e. year and company title) may be listed provided the fiscal years for both the 10-K report and this report are compatible.

At December 31, 1983, American Natural Resources Company owned 100% of the outstanding common stock of Respondent. Other companies controlled by American Natural Resources Company (collectively, the "System") are as follows:

Name of Company	Kind of Business
American Natural Resources Company (Note 1)	Holding company.
ANG Coal Gasification Company	Engaged in planning and designing a coal gasification plant.
ANR Coal Company (Note 2)	Holding company for System coal projects.
ANR Coal Sales, Incorporated	Markets coal on behalf of System coal companies.
ANR Western Coal Development Company	Owns lignite reserves in North Dakota.
Apache Mining Company (doing business as Enterprise Coal Company)	Owns and operates coal properties in Eastern Kentucky.
Brooks Run Coal Company	Develops and operates coal properties in West Virginia.
Cat Run Coal Company	Organized to own and operate coal properties in West Virginia.
Enterprise Coal Company	Organized to own and operate coal properties in Eastern Kentucky.
VICC Land Company	Owns coal properties in Virginia and Kentucky.
Virginia City Coal Company	Owns coal properties in Virginia.
Virginia Iron, Coal and Coke Company	Operates coal properties in Virginia and Kentucky.
ANR Freight System, Inc. (Note 3)	Holding company for System trucking.
Associated Truck Lines, Inc. (Note 4)	Motor vehicle common carrier.
Associated Truck Lines of Canada, Inc.	Provides sales services.

Name of Respondent	This Report Is	Date of Report (Mo, Da, Yr)	Year of Report
ANR PIPELINE COMPANY	(1) [X] An Original (2) [ ] A Resubmission		Dec. 31 1983

CONTROL OVER RESPONDENT

1. If any corporation, business trust, or similar organization or combination of such organizations jointly held control over the respondent at end of year, state name of controlling corporation or organization, manner in which control was held, and extent of control. If control was in a holding company organization, show the chain of ownership or control to the main parent company or organization. If control was held by a trustee(s), state name of trustee(s), name of beneficiary or beneficiaries for whom trust was maintained, and purpose of the trust. If other companies are controlled by the organization which holds control over the respondent, list the names of such companies and the kind of business each is engaged in.

2. If the above required information is available from the SEC 10-K Report Form filing, a specific reference to the report form (i.e. year and company title) may be listed provided the fiscal years for both the 10-K report and this report are compatible.

Name of Company	Kind of Business
ANR Freight System, Inc. (Note 3) (Continued)	
Garrett Freightlines, Inc.	Motor vehicle common carrier.
Graves Truck Line, Inc. (Note 5)	Motor vehicle common carrier.
Road Equipment Financing, Inc.	Presently inactive.
Neuendorf Transportation Company	Motor vehicle common carrier.
United Truck Rentals, Inc.	Leases real estate and motor carrier equipment.
ANRFS Holdings, Inc.	Organized to act as holding company for System trucking.
ANR Gasification Properties Company	Member of partnership constructing a coal gasification plant.
ANR Gathering Company	Organized to purchase, gather and sell gas to industrial users.
ANR Information Systems Company	Organized to provide information systems services on a commercial basis.
ANR Media Company	Places media advertising on behalf of System companies.
ANR Production Company	Gas and oil exploration, development and production.
ANR Storage Company (Note 6)	Storage of natural gas.
ANR Intrastate Storage Company	Organized to produce natural gas from and lease storage rights in a Michigan natural gas reservoir.
ANR Michigan Storage Company	Organized to form a partnership to develop natural gas storage fields in Michigan.

CONTROL OVER RESPONDENT

1. If any corporation, business trust, or similar organization or combination of such organizations jointly held control over the respondent at end of year, state name of controlling corporation or organization, manner in which control was held, and extent of control. If control was in a holding company organization, show the chain of ownership or control to the main parent company or organization. If control was held by a trustee(s), state name of trustee(s), name of beneficiary or beneficiaries for whom trust was maintained, and purpose of the trust. If other companies are controlled by the organization which holds control over the respondent, list the names of such companies and the kind of business each is engaged in.

2. If the above required information is available from the SEC 10-K Report Form filing, a specific reference to the report form (i.e. year and company title) may be listed provided the fiscal years for both the 10-K report and this report are compatible.

Name of Company	Kind of Business
ANR Storage Company (Note 6) (Continued)	
ANR Western Storage Company	Member of partnership which developed a natural gas storage field in Kansas.
ANR Technology Company (Note 7)	Holding company for System technology projects.
ANR Energy Conversion Company	Member of partnerships which are developing thermoelectric and ovonic battery technology.
American Natural Alaskan Company	Presently inactive.
American Natural Arctic Company	Presently inactive.
American Natural Resources International Finance, NV (Note 8)	Offshore financing subsidiary.
ANR Finance, BV (Note 9)	Offshore financing subsidiary.
ANR Finance, NV	Offshore financing subsidiary.
American Natural Service Company	Presently inactive.
Great Lakes Gas Transmission Company (Note 10)	Natural gas transmission company.
GLGT, Inc.	Engages in the business of safe harbor leasing.

Note 1: American Natural Resources Company owns 50% of all outstanding voting securities of Great Lakes Gas Transmission Company and all of the outstanding voting securities of ANG Coal Gasification Company, ANR Coal Company, ANR Freight System, Inc., ANRFS Holdings, Inc., ANR Gasification Properties Company, ANR Gathering Company, ANR Information Systems Company, ANR Media Company, ANR Production Company, ANR Storage Company, ANR Technology Company, American Natural Alaskan Company, American Natural Arctic Company, American Natural Resources International Finance, NV and American Natural Service Company.

CONTROL OVER RESPONDENT

1. If any corporation, business trust, or similar organization or combination of such organizations jointly held control over the respondent at end of year, state name of controlling corporation or organization, manner in which control was held, and extent of control. If control was in a holding company organization, show the chain of ownership or control to the main parent company or organization. If control was held by a trustee(s), state name of trustee(s), name of beneficiary or beneficiaries for whom trust was maintained, and purpose of the trust. If other companies are controlled by the organization which holds control over the respondent, list the names of such companies and the kind of business each is engaged in.

2. If the above required information is available from the SEC 10-K Report Form filing, a specific reference to the report form (i.e. year and company title) may be listed provided the fiscal years for both the 10-K report and this report are compatible.

Note 2: ANR Coal Company owns all of the outstanding voting securities of ANR Coal Sales, Incorporated, ANR Western Coal Development Company, Apache Mining Company, Brooks Run Coal Company, Cat Run Coal Company, Enterprise Coal Company, VICC Land Company, Virginia City Coal Company and Virginia Iron, Coal and Coke Company.

Note 3: ANR Freight System, Inc. owns all of the outstanding voting securities of Associated Truck Lines, Inc., Garrett Freightlines, Inc., Graves Truck Line, Inc., Neuendorf Transportation Company and United Truck Rentals, Inc.

Note 4: Associated Truck Lines, Inc. owns all of the outstanding voting securities of Associated Truck Lines of Canada, Inc.

Note 5: Graves Truck Line, Inc. owns all of the outstanding voting securities of Road Equipment Financing, Inc.

Note 6: ANR Storage Company owns all of the outstanding voting securities of ANR Intrastate Storage Company, ANR Michigan Storage Company and ANR Western Storage Company.

Note 7: ANR Technology Company owns all of the outstanding voting securities of ANR Energy Conversion Company.

Note 8: American Natural Resources International Finance, NV owns all of the outstanding voting securities of ANR Finance, BV.

Note 9: ANR Finance, BV owns all of the outstanding voting securities of ANR Finance, NV.

Note 10: Great Lakes Gas Transmission Company owns all of the outstanding voting securities of GLGT, Inc.

Name of Respondent	This Report Is	Date of Report	Year of Report
ANR PIPELINE COMPANY	(1) [X] An Original (2) [ ] A Resubmission	(Mo, Da, Yr)	Dec 31, 19 83

CONSTRUCTION WORK IN PROGRESS-GAS (Account 107)

1. Report below descriptions and balances at end of year of projects in process of construction (107).
2. Show items relating to "research, development, and demonstration" projects last, under a caption Research, Development, and Demonstration (see Account 107 of the Uniform System of Accounts).
3. Minor projects (less than $500,000) may be grouped.

Line No	Description of Project (a)	Certificate Number (b)	Construction Work in Progress - Gas (Account 107) (c)
1	Gathering system facilities		
2	Projects requiring certification		
3	Install 46.3 miles of 36" pipeline, metering facilities; an		
4	interconnection and plant expansion of Transcontinental's		
5	Markham Plant	CP82-158	$ 2,375,000
6			
7	Install 32.13 miles of 36" pipeline at Brazos Block 538	CP82-158	1,409,000
8			
9	Projects not requiring certification		
10	Replace 30" mainline, Eugene Island Area, Block 54		1,280,475
11			
12	Projects under $500,000		1,947,027
13			
14	Storage system facilities		
15	Projects not requiring certification		
16	Replace 0.3 miles of 24" pipeline,		666,980
17	Reed City, Michigan		
18			977,507
19	Projects under $500,000		
20			
21	Transmission system facilities		
22	Projects requiring certification		
23	Install 31.15 miles of 20" pipeline,		
24	Madison lateral, Wisconsin	CP83-183	1,127,911
25			
26	Projects not requiring certification		
27	Replace 24" mainline and lateral line,		713,660
28	Nemaha River, Nebraska		
29			
30	Install flow computers and remote terminal units at		
31	80 stations throughout the system to convert		1,491,123
32	customers to electronic measurement		
33			4,108,569
34	Projects under $500,000		
35			
36	Miscellaneous		1,879,797
37	Unallocated overheads		
38			
39			
40			
41			
42			
43	TOTAL		$17,977,049

OMB No. 1902-0028
(Expires 7/31/84)

4



FERC FORM NO. 2:
ANNUAL REPORT OF NATURAL GAS COMPANIES
(Class A and Class B)

This report is mandatory under the Natural Gas Act, Sections 10(a) and 16, and 18 CFR 260.2. Failure to report may result in criminal fines, civil penalties and other sanctions as provided by law. The Federal Energy Regulatory Commission does not consider this report to be of a confidential nature.

Exact Legal Name of Respondent (Company)	Year of Report
ANR STORAGE COMPANY	Dec. 31, 1983

FERC FORM NO. 2 (REVISED 12-81)

108

ANR STORAGE COMPANY	(1) ☒ An Original (2) ☐ A Resubmission		Dec. 31 1983

GENERAL INFORMATION

1. Provide name and title of officer having custody of the general corporate books of account and address of office where the general corporate books are kept, and address of office where any other corporate books of account are kept, if different from that where the general corporate books are kept.

John D. Kobasa, Vice President
One Woodward Avenue
Detroit, Michigan 48226

2. Provide the name of the State under the laws of which respondent is incorporated, and date of incorporation. If incorporated under a special law, give reference to such law. If not incorporated, state that fact and give the type of organization and the date organized.

Michigan
February 8, 1978

3. If at any time during the year the property of respondent was held by a receiver or trustee, give (a) name of receiver or trustee, (b) date such receiver or trustee took possession, (c) the authority by which the receivership or trusteeship was created, and (d) date when possession by receiver or trustee ceased.

Not Applicable

4. State the classes of utility and other services furnished by respondent during the year in each State in which the respondent operated.

Respondent was engaged in rendering gas storage service in the State of Michigan for interstate pipeline companies.

5. Have you engaged as the principal accountant to audit your financial statements an accountant who is not the principal accountant for your previous year's certified financial statements?

(1) ☐ Yes... Enter the date when such independent accountant was initially engaged: _____
(2) ☒ No

Name of Respondent	This Report Is	Date of Report	Year of Report
ANR STORAGE COMPANY	(1) [X] An Original (2) [ ] A Resubmission	(Mo, Da, Yr)	Dec 31, 1983

CORPORATIONS CONTROLLED BY RESPONDENT

1. Report below the names of all corporations, business trusts, and similar organizations, controlled directly or indirectly by respondent at any time during the year. If control ceased prior to end of year, give particulars (details) in a footnote.
2. If control was by other means than a direct holding of voting rights, state in a footnote the manner in which control was held, naming any intermediaries involved.
3. If control was held jointly with one or more other interests, state the fact in a footnote and name the other interests.
4. If the above required information is available from the SEC 10-K Report Form filing, a specific reference to the report form (i.e. year and company title) may be listed in column (a) provided the fiscal years for both the 10-K report and this report are compatible.

DEFINITIONS

1. See the Uniform System of Accounts for a definition of control.
2. Direct control is that which is exercised without interposition of an intermediary.
3. Indirect control is that which is exercised by the interposition of an intermediary which exercises direct control.
4. Joint control is that in which neither interest can effectively control or direct action without the consent of the other, as where the voting control is equally divided between two holders, or each party holds a veto power over the other. Joint control may exist by mutual agreement or understanding between two or more parties who together have control within the meaning of the definition of control in the Uniform System of Accounts, regardless of the relative voting rights of each party.

Name of Company Controlled (a)	Kind of Business (b)	Percent Voting Stock Owned (c)	Footnote Ref. (d)
ANR Western Storage Company	Partner in company formed to develop and operate natural gas storage facilities in Southwest Kansas	100	Note 1a., Page 122A
ANR Michigan Storage Company	Partner in company formed to develop and operate natural gas storage facilities in Northern Michigan	See note below	
ANR Intrastate Storage Company	Natural gas production in Northern Michigan	See note below	

Note:
ANR Michigan Storage Company and ANR Intrastate Storage Company have been formed but no voting has been issued. Respondent will own 100% of the voting stock of both companies should such voting stock be issued. The issuance of voting stock by ANR Michigan Storage Company and ANR Intrastate Storage Company is dependent on FERC approval and disposition of the certificate applications outstanding at Dockets CP82-478-000 and CP83-144-000, respectively.

Name of Respondent	This Report Is	Date of Report (Mo, Da, Yr)	Year of Report
ANR STORAGE COMPANY	(1) [X] An Original (2) [ ] A Resubmission		Dec. 31, 1983

COMPARATIVE BALANCE SHEET (ASSETS AND OTHER DEBITS)

Line No	Title of Account (a)	Ref. Page No. (b)	Balance at Beginning of Year (c)	Balance at End of Year (d)
1	**UTILITY PLANT**			
2	Utility Plant (101-106, 114)	200	$117,074,297	$122,373,769
3	Construction Work in Progress (107)	200	4,084,554	1,666,459
4	TOTAL Utility Plant *(Enter Total of lines 2 and 3)*		121,158,851	124,040,228
5	(Less) Accum. Prov. for Depr. Amort. Depl. (108, 111, 115)	200	11,126,860	16,613,499
6	Net Utility Plant *(Enter Total of line 4 less 5)*	–	110,031,991	107,426,729
7	Nuclear Fuel (120.1-120.4)	201		
8	(Less) Accum. Prov. for Amort. of Nucl. Fuel Assemblies (120.5)	201		
9	Net Nuclear Fuel *(Enter Total of line 7 less 8)*	–		
10	Net Utility Plant *(Enter Total of lines 6 and 9)*	–	110,031,991	107,426,729
11	Utility Plant Adjustments (116)	122		
12	Gas Stored Underground-Noncurrent (117)	214	9,864,862	9,924,784
13	**OTHER PROPERTY AND INVESTMENTS**			
14	Nonutility Property (121)	215	-	5,964,310
15	(Less) Accum. Prov. for Depr. and Amort. (122)	215	-	914,940
16	Investments in Associated Companies (123)	216		
17	Investment in Subsidiary Companies (123.1)	217	10,458,432	7,503,325
18	(For Cost of Account 123.1, See Footnote Page 217, line 23)	–		
19	Other Investments (124)	216.219		
20	Special Funds (125-128)	–		
21	TOTAL Other Property and Investments *(Total of lines 14 thru 20)*	–	10,458,432	12,552,695
22	**CURRENT AND ACCRUED ASSETS**			
23	Cash (131)	–	(105,386)	(59,601)
24	Special Deposits (132-134)	–		
25	Working Funds (135)	–	4,025	6,025
26	Temporary Cash Investments (136)	216		
27	Notes Receivable (141)	–		
28	Customer Accounts Receivable (142)	–	3,541,393	2,920,810
29	Other Accounts Receivable (143)	–	21,237	8,491
30	(Less) Accum. Prov. for Uncollectible Acct.-Credit (144)	–		
31	Notes Receivable from Associated Companies (145)	–	2,950,000	850,000
32	Accounts Receivable from Assoc. Companies (146)	–	42,947	62,287
33	Fuel Stock (151)	–		
34	Fuel Stock Expense Undistributed (152)	–		
35	Residuals (Elec) and Extracted Products (Gas) (153)	–		
36	Plant Material and Operating Supplies (154)	–	1,136,458	1,197,775
37	Merchandise (155)	–		
38	Other Material and Supplies (156)	–		
39	Nuclear Materials Held for Sale (157)	201		
40	Stores Expenses Undistributed (163)	–		
41	Gas Stored Underground – Current (164.1)	214		
42	Liquefied Natural Gas Stored (164.2)	214		
43	Liquefied Natural Gas Held for Processing (164.3)	214		
44	Prepayments (165)	220	19,013	72,918
45	Advances for Gas Explor., Devel. and Prod. (166)	219		
46	Other Advances for Gas (167)	219		
47	Interest and Dividends Receivable (171)	–		
48	Rents Receivable (172)	–		
49	Accrued Utility Revenues (173)	–		
50	Miscellaneous Current and Accrued Assets (174)		1,785,559	1,692,233
1	TOTAL Current and Accrued Assets *(Enter Total of lines 23 thru 50)*		$ 9,395,246	$ 6,750,938

FERC FORM NO. 2 (REVISED 12-81)

Name of Respondent	This Report Is:	Date of Report (Mo, Da, Yr)	Year of Report
ANR STORAGE COMPANY	(1) [X] An Original (2) [ ] A Resubmission		Dec. 31, 1983

COMPRESSOR STATIONS

1. Report below particulars (details) concerning compressor stations. Use the following subheadings: field compressor stations, products extraction compressor stations, underground storage compressor stations, transmission compressor stations, distribution compressor stations, and other compressor stations.

2. For column (a), indicate the production areas where such stations are used. Relatively small field compressor stations may be grouped by production areas. Show the number of stations grouped. Designate any station held under a title other than full ownership. State in a footnote the name of owner or co-owner, the nature of respondent's title, and percent of ownership, if jointly owned. Designate any station that was not operated during the past year. State in a footnote whether the book cost of such station has been retired in the books of account, or what disposition of the station and its book cost are contemplated. Designate any compressor units in transmission compressor stations installed and put into operation during the year and show in a footnote the size of each such unit, and the date each such unit was placed in operation.

3. For column (d), include the type of fuel or power, if other than natural gas. If two types of fuel or power are used, show separate entries for natural gas and the other fuel or power.

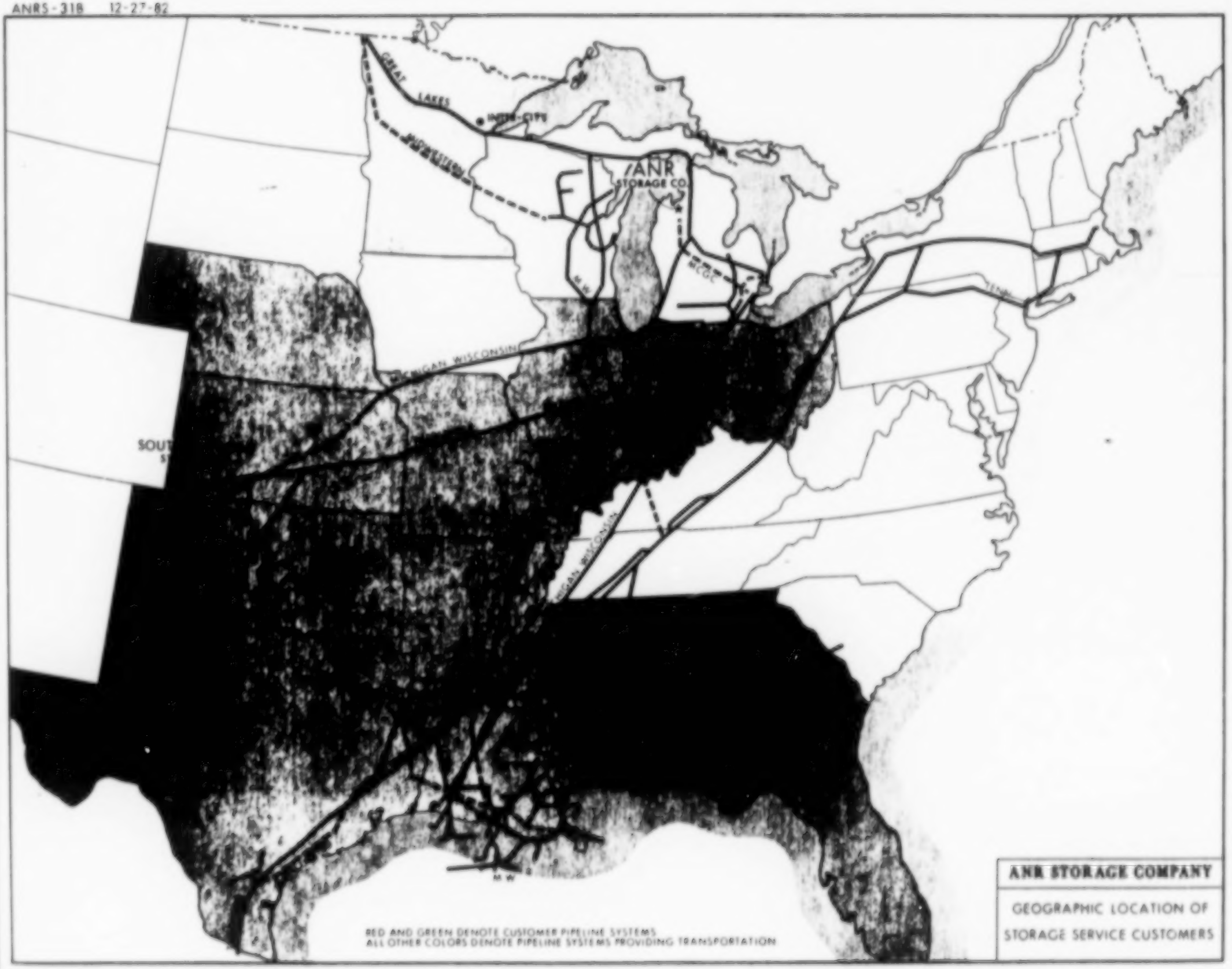
Line No.	Name of Station and Location (a)	Number of Employees (b)	Plant Cost (c)	Expenses (Except depreciation and taxes)		Gas for Compressor Fuel Mcf (14.73 psia at 60°F) (f)	Operation Data		
				Fuel or Power (2) (d)	Other (e)		Total Compressor Hours of Operation During Year (g)	No. of Comprs. Operated at Time of Station Peak (h)	Date of Station Peak (i)
1	Rapid River 35								
2	(Rapid River Township,								
3	Kalkaska County, Michigan)	(1)	$13,420,718	$ 5,916	$ 302,148	101,933	2,707	2	6/11/83
4									
5	Cold Springs 12								
6	(Blue Lake Township,								
7	Kalkaska County, Michigan)	(1)	17,606,018	9,741	422,670	119,358	3,203	2	5/20/83
8									
9	Excelsior 6								
10	(Excelsior Township,								
11	Kalkaska County, Michigan)	(1)	18,310,190	6,063	185,149	141,059	2,232	2	9/23/83
12									
13									
14									
15	(1) Respondent's three compressor stations are adjacent to each								
16	other and operated by employees from one central field office.								
17	Total number of field operating employees is 28.								
18									
19	(2) Consists primarily of purchased electrical power.								
20									
21									
22									
23									
24									

ANR PIPELINE COMPANY
PLANT INVESTMENT BY STATE
AS OF DECEMBER 31, 1983

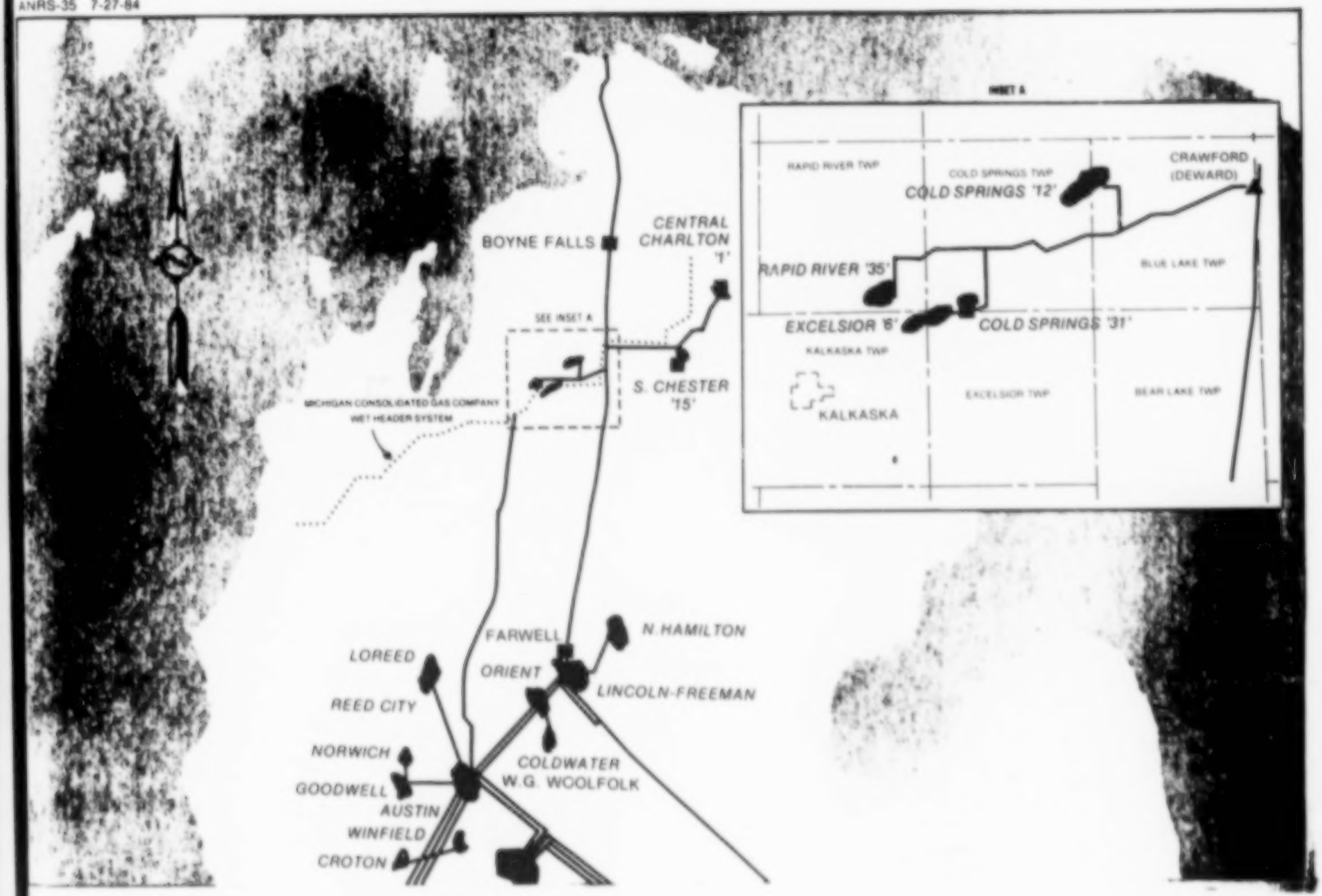
State	Total Plant Investment	Net Plant Investment
Arkansas	$ 11,815,195	$ 4,804,477
Federal Waters	447,757,010	241,455,320
Illinois	121,223,559	56,646,003
Indiana	190,848,632	85,981,311
Iowa	42,879,449	7,532,227
Kansas	93,552,548	26,306,211
Kentucky	50,271,754	18,388,916
Louisiana	311,650,807	160,776,399
Michigan	446,323,113	309,491,427
Mississippi	74,184,863	30,836,155
Ohio	48,343,310	22,486,683
Oklahoma	243,459,499	133,180,171
Tennessee	63,946,946	25,638,107
Texas	36,786,489	14,545,735
Wisconsin	143,286,512	59,637,231
Wyoming	8,276,900	6,221,842
Missouri	22,275,120	4,176,683
Nebraska	1,841,778	972,354

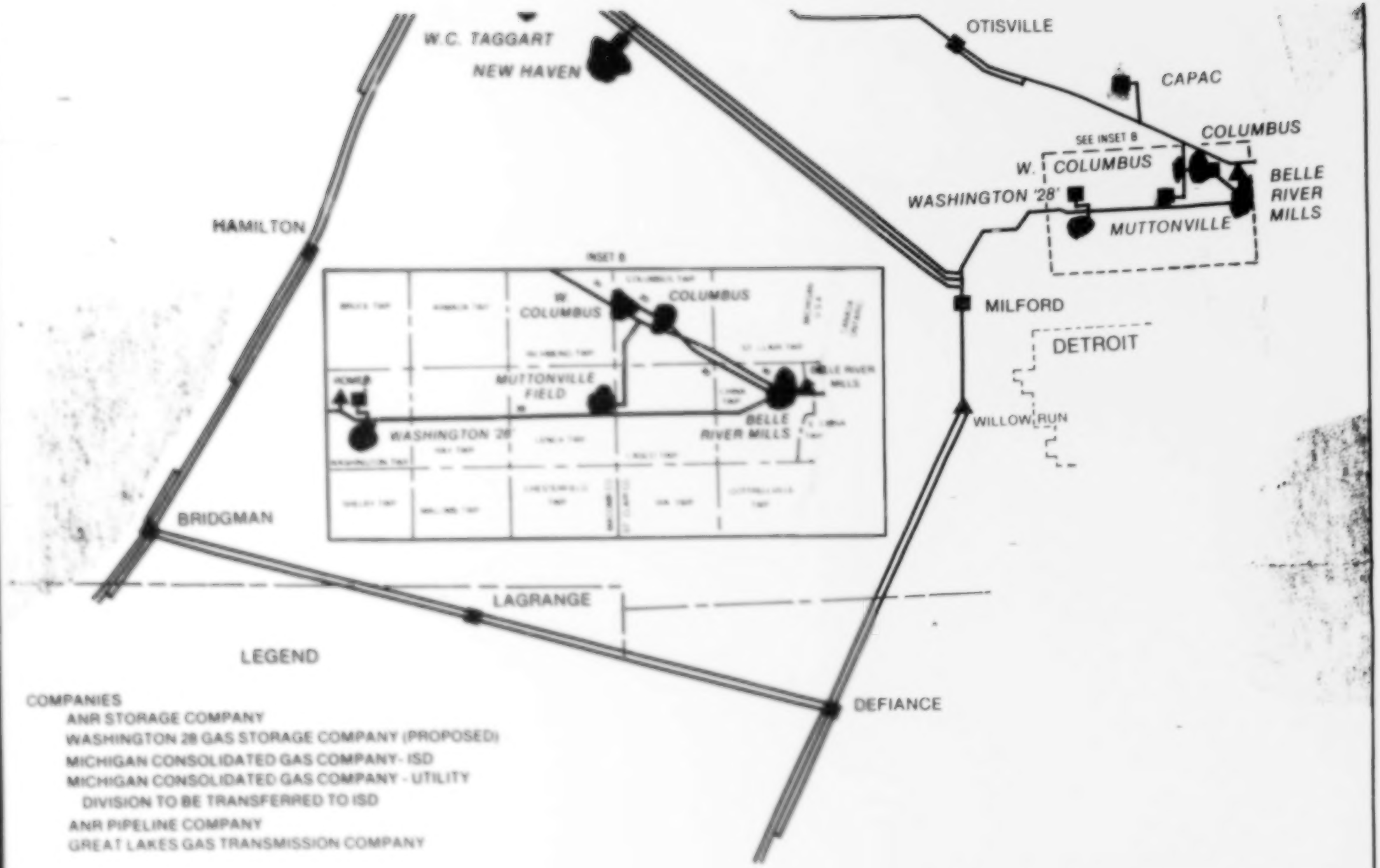
8

ANRS-318 12-27-82



ANRS-35 7-27-84



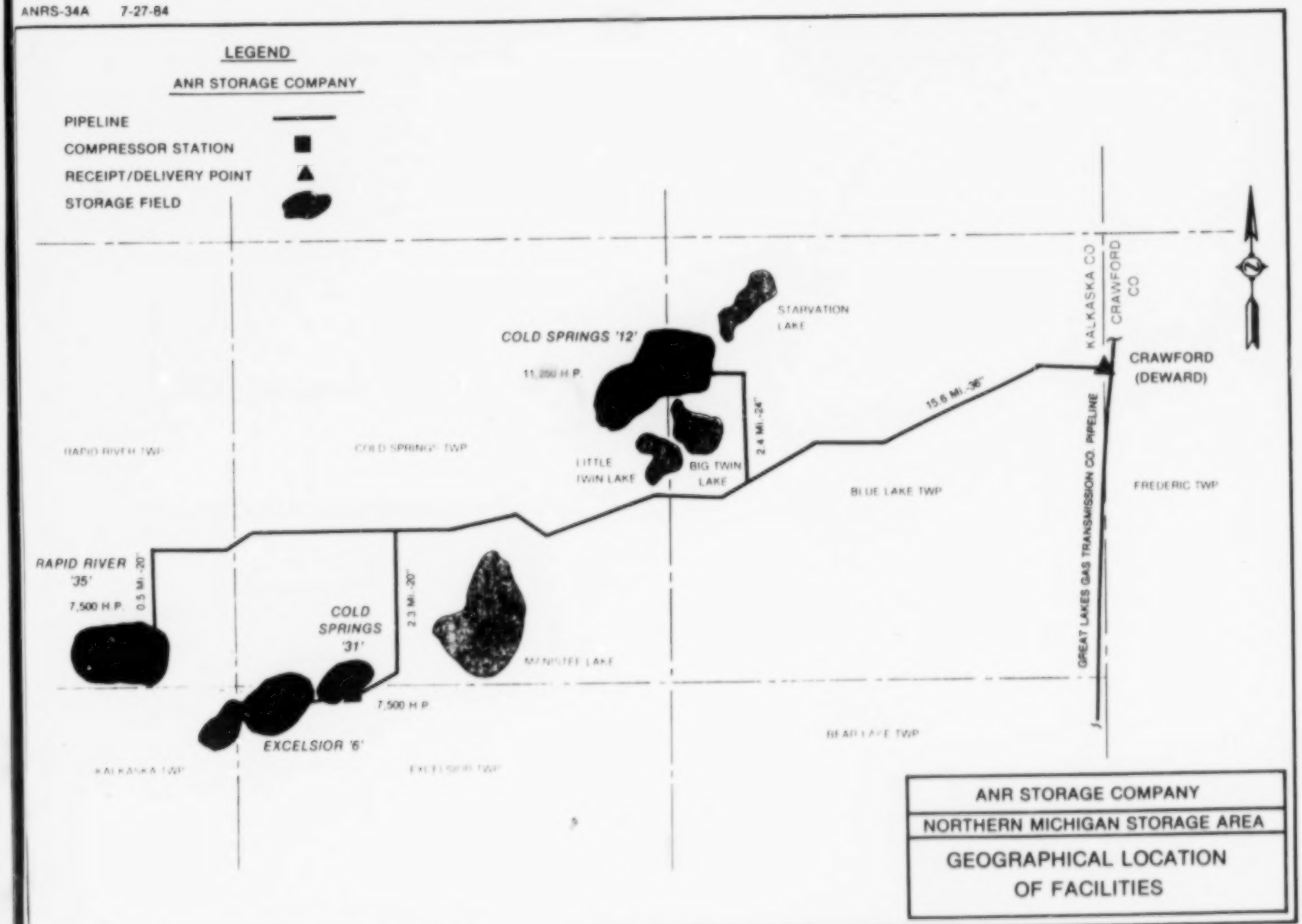


ANR STORAGE COMPANY

MICHIGAN AREA

GEOGRAPHICAL LOCATION OF FACILITIES

ANRS-34A 7-27-84



STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

• • • • •

In the matter of the inquiry, on the Commission's own motion, into the proposed divestiture of Michigan Consolidated Gas Company by American Natural Resources Company. Case No. U-6790

At a session of the Michigan Public Service Commission held at its offices in the City of Lansing, Michigan, on the 5th day of March, 1981.

PRESENT: Hon. Daniel J. Demlow, Chairperson
Hon. Eric J. Schneidewind, Commissioner
Hon. Edwyna G. Anderson, Commissioner

ORDER AND NOTICE OF HEARING

American Natural Resources Company (American Natural), the holding company parent of Michigan Consolidated Gas Company (Michigan Consolidated), has announced to the public at large that its board of directors has directed the management of American Natural to conduct studies to determine whether Michigan Consolidated should be separated from the American Natural System. This Commission is aware that such studies are under way and that upon completion American Natural will decide whether or not to separate Michigan Consolidated. If the separation were to be implemented, Michigan Consolidated would no longer operate as a subsidiary of American Natural.

Michigan Consolidated is a gas distribution utility which supplies natural gas to more than one million retail customers in Michigan. It serves approximately 70,000 general service customers and 950,000 residential customers. Additionally, 200 large volume firm service industrial customers, along with 140 interruptible customers and 300 school customers are provided with natural gas service. The service area of Michigan Consolidated includes the Cities of Detroit, Grand Rapids and Muskegon, along with the northern portion of the Lower Peninsula and areas in the Upper Peninsula.

This Commission is concerned that a decision for divestiture by American Natural not act to impair the capability of Michigan Consolidated to continue to provide reliable and adequate gas service to its customers at reasonable rates. After careful consideration of this matter, and with recognition that specific aspects of any divestiture action as it concerns prudency on the part of Michigan Consolidated's management may be addressed in future contested rate proceedings, the Commission concludes that hearings of a fact-finding nature are in the public interest. It is the intent of the Commission that appropriate officials of Michigan Consolidated appear and present testimony as to what the proposal for divestiture is, and the underlying reasoning for any proposed division of responsibilities, opportunities and resources.

The Commission FINDS that:

a. The public interest requires that the Commission, on its own motion, inquire into the matter of the possible divestiture of Michigan Consolidated by American Natural.

b. Public hearings should be held for the purpose of receiving testimony from appropriate officials of Michigan Consolidated regarding the proposal for divestiture, the underlying reasoning for any proposed division of responsibilities, opportunities and resources, the impact of the proposed divestiture on Michigan Consolidated's capability to render adequate,

reliable and safe natural gas service to present and future customers, the impact of the proposed divestiture on Michigan Consolidated's capability to serve its customers at the lowest [2] possible rates, and the Commission's jurisdiction in these matters.

c. The proceedings should be in the nature of a legislative inquiry and any interested person shall be provided the opportunity to present comments on the proposed divestiture.

d. Jurisdiction is pursuant to 1909 PA 300, as amended, MCLA 462.2 et seq.; 1919 PA 419, as amended, MCLA 460.51 et seq.; 1939 PA 3, as amended, MCLA 460.1 et seq.; 1969 PA 306, as amended, MCLA 24.201 et seq.; and the Commission's Rules of Practice and Procedure, 1954 Administrative Code, 1968 Annual Supplement, R 460.11 et seq.

THEREFORE, IT IS ORDERED and NOTICE IS GIVEN that:

A. A public hearing will commence at 9:30 a.m. on March 23, 1981 in the offices of the Commission, Mercantile Building, 6545 Mercantile Way, Lansing, Michigan.

B. Michigan Consolidated shall provide appropriate notice of the hearing within its service territory.

C. Michigan Consolidated shall file prepared testimony on or before March 16, 1981 addressing the following areas of Commission interest:

1. A discussion of the proposal for divestiture.
2. A discussion of the underlying reasoning for any proposed division of responsibilities, opportunities and resources.
3. A discussion of the impact of the proposed divestiture on Michigan Consolidated's capability to render adequate, reliable and safe natural gas service to present and future customers.

4. A discussion of the impact of the proposed divestiture on Michigan Consolidated's capability to serve its customers at the lowest possible rates.

5. A discussion of any transactions since January 1, 1975 in which assets of Michigan Consolidated were sold, leased or otherwise transferred to the control of American Natural or other subsidiaries of American Natural, including any such transactions in progress or under negotiation in anticipation of divestiture. [3]

6. A discussion of any similar transactions since January 1, 1975 or transactions in progress or transactions anticipated between the Utility and Interstate Storage Divisions of Michigan Consolidated.

7. An assessment of opportunities, after any divestiture, for diversification by Michigan Consolidated into activities other than the retail sale of natural gas.

D. A legal brief shall be filed concerning the Commission's jurisdiction and/or authority to order any of the above transactions to be set aside.

E. American Natural is requested to fully participate in this inquiry and to provide testimony addressing the areas of Commission interest as set forth in paragraph C above.

F. The Staff of the Commission shall provide comments in the areas of Commission interest following its review of the testimony of Michigan Consolidated and of American Natural, if any.

G. All interested persons shall be provided the opportunity to present comments in the form of either testimony or prepared statements.

H. These proceedings be held in the nature of a legislature inquiry rather than an adversary hearing. Statements will be made under oath but will not be subject to cross-examination.

Statements may be subject to questioning by the Commissioners, the Administrative Law Judge and the Commission Staff.

I. The Commission may require Michigan Consolidated to submit amended testimony if it deems the prepared testimony to be insufficient, incomplete or inadequate.

J. Because further sale, lease or transfer of assets by Michigan Consolidated to American Natural would partially subvert the purposes of this inquiry, the Commission requests that any such transactions not take place during the pendency of this proceeding.

The Commission specifically reserves jurisdiction of the matters herein [4] contained and the authority to issue such further order or orders as the facts and circumstances may require.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ DANIEL J. DEMLOW
Chairperson

(SEAL)

/s/ ERIC J. SCHNEIDEWIND
Commissioner

/s/ EDWYNA G. ANDERSON
Commissioner

By the Commission and pursuant to its action of March 5, 1981.

/s/ THOMAS R. LONERGAN
Its Secretary

[5]

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the inquiry, on the Commission's own motion, into certain transactions between Michigan Consolidated Gas Company and American Natural Resources Company and its subsidiaries, and into the proposed divestiture of Michigan Consolidated Gas by American Natural Resources Company.

Case No. U-6954

At a session of the Michigan Public Service Commission held at its offices in the City of Lansing, Michigan on the 10th day of August, 1981.

PRESENT: Honorable Daniel J. Demlow, Chairperson
Honorable Eric J. Schneidewind, Commissioner
Honorable Edwyna G. Anderson, Commissioner

ORDER TO SHOW CAUSE AND NOTICE OF HEARING

On March 5, 1981, this Commission issued its Order and Notice of Hearing in case No. U-6790 initiating factfinding hearings of a legislative nature into various issues concerning the proposed divestiture of Michigan Consolidated Gas Company (Michigan Consolidated) by American Natural Resources Company (ANR). The proceedings in U-6790 comprised eight

days of public hearings held during the period March 23 to June 15, 1981, including the testimony from officers of Michigan Consolidated and ANR and subsequent written comments thereon by the Commission Staff and Michigan Consolidated. Issues in U-6790 centered primarily around the impact of the proposed Michigan Consolidated divestiture upon the utility's ability to render adequate service at reasonable rates, and the circumstances concerning transfers of certain Michigan Consolidated assets to the control of ANR subsidiaries, among other matters.

On or about April 3, 1981, Michigan Consolidated and ANR Storage Company (ANR Storage) filed an application before the United States Federal Energy Regulatory Commission (FERC) in docket CP81-311 et el to obtain certificates of public convenience and necessity authorizing the leasing of certain of Michigan Consolidated's Interstate Storage Division (ISD) and Utility Division (UD) facilities to ANR Storage and authorizing the rendering of certain gas transportation services by ANR Storage to Michigan Consolidated. This joint FERC application followed the signing of lease and transportation agreements, dated February 27, 1981, between Michigan Consolidated and ANR Storage providing for the lease of certain Michigan Consolidated facilities to ANR Storage and the rendering of gas transportation services by ANR Storage to Michigan Consolidated Gas.

This Commission has also faced numerous issues relating to the establishment of Michigan Consolidated's ISD, and specifically the ratemaking treatment to be accorded the rate base, revenues, and expenses relating thereto, in several recent rate cases decided by the Commission, including case No. U-5365 (Commission Order dated September 28, 1978), U-5955 (Commission Order dated November 6, 1979), and U-6372 (Commission Order dated January 30, 1981). The Commission has uniformly held in these decisions that

Michigan Consolidated's ISD comprises property subject to this Commission's jurisdiction, and specifically that all ISD rate base, revenues, and expenses should be included in Michigan Consolidated's cost of service for ratemaking purposes.

Due to the Commission's recent legislative hearings in U-6790, the recent joint Michigan Consolidated and ANR Storage application to FERC, and the [2] various Commission rate proceeding, all referenced earlier, along with various company statements issued to the media in recent months, the Commission is aware of several transactions between Michigan Consolidated and its parent company, ANR and/or its subsidiaries, which may be subject to this Commission's jurisdiction and which will affect Michigan Consolidated's long-term viability as a utility capable of providing adequate and reliable natural gas service to Michigan customers at reasonable rates. Further, the Commission is aware from the above proceedings that ANR and its subsidiaries, including ANR Storage and Michigan Consolidated, are undertaking a corporate strategy apparently aimed at the eventual divestiture of Michigan Consolidated from ANR, but with Michigan Consolidated becoming in the process dispossessed of control over valuable assets or property rights which may have considerable potential relative to the long-term financial and operational strength of Michigan Consolidated as a Michigan utility. Further, the Commission is also aware from the above referenced proceedings that significant questions exist relative to the arms-length bargaining situation, or lack thereof, prevailing over negotiations and transactions between ANR and/or its subsidiaries and Michigan Consolidated.

This Commission is particularly cognizant of the joint Michigan Consolidated/ANR Storage application to FERC, and the recent February 1981 lease and transportation agreements referenced earlier, which indicate that Michigan Consolidated intends now to discontinue certain of its gas transportation services and to abandon certain of its facilities

owned and utilized by both its UD and its ISD, all of which facilities are presently part of Michigan Consolidated's property subject to ratemaking determinations of this Commission. The Commission is concerned that Michigan Consolidated has not sought this Commission's prior approval relative to these transaction, and is also con- [3] cerned about Michigan Consolidated's acquiescence in turning over control of its storage and transportation facilities to its affiliate, ANR Storage.

In view of this Commission's past decisions finding that Michigan Consolidated's ISD facilities could not be legally or factually distinguished and separated from its UD facilities, and in view of the joint Michigan Consolidated/ANR Storage application to FERC seeking authorization for Michigan Consolidated to abandon certain of its ISD and UD facilities and services without properly presenting these proposals for this Commission's prior consideration and authorization, the Commission determines that it is in the public interest to commence this contested case proceeding, on its own motion, to consider all relevant factual and legal issues concerning Michigan Consolidated's past, present, or contemplated transactions with ANR and/or its subsidiaries, including ANR Storage and Michigan Natural Resources (MNR), which may have an adverse effect upon the long-term financial or operational strength of Michigan Consolidated as a publicly regulated gas utility capable of supplying adequate gas service to Michigan customers at the most reasonable rates possible, and also all factual and legal issues relating to the proposed divestiture of Michigan Consolidated by ANR as it may bear upon the duties and jurisdiction of this Commission. The need for this contested case is reinforced by the information obtained by the Commission within the context of the above referenced proceedings.

The Commission hereby notifies all potential parties that the purpose of this contested case is to comprehensively decide

all relevant factual and legal issues falling within the parameters described in the previous paragraph. In this regard, the Commission seeks testimony and legal argument relative to the manner in which this Commission should exercise its jurisdiction relative to [4] the following issues:

1. All facts, background, and legal issues concerning the joint February 27, 1981 Michigan Consolidated/ANR Storage lease and transportation agreements, to include the issue of whether the proposed abandonment or transfer to ANR Storage of the Michigan Consolidated transmission and storage facilities which are the subject of the leases are lawful and equitable, prudent, and in the public interest.

2. All facts, background, and legal issues concerning Michigan Consolidated's transfer of gas purchase rights, storage options, storage deeds, mineral deeds, or other property or rights, to ANR Storage pursuant to a Michigan Consolidated/ANR Storage agreement of November 5, 1980 (Exhibit 15 to case No. U-6790, Exhibit R-1), to include whether such transactions are lawful and equitable, prudent, and in the public interest.

3. All facts, background, and legal issues concerning the 1976 transfer of oil and gas leases from Michigan Consolidated to its affiliate MNR (now American Natural Gas Production Company), including leases governing the gas reserves in the Washington 10 gas field area, to include whether such transactions were lawful and equitable, prudent, and in the public interest.

4. All facts, background, and legal issues concerning any other transaction or transfer of assets or property rights by Michigan Consolidated to ANR or any ANR subsidiary since January 1, 1975 which may adversely affect Michigan Consolidated's long-term financial or operational strength as a regulated gas utility capable of providing reliable gas service to Michigan customers at the most reasonable rates

possible, or which may relate to the proposed divestiture of Michigan Consolidated by ANR.

5. Reasons why Michigan Consolidated has not obtained this Commission's advance approval prior to leasing, selling, abandoning, or otherwise transferring its utility property to ANR Storage or to other ANR subsidiaries, along with all other matters relevant to whether this Commission should require ANR and its subsidiaries to return to Michigan Consolidated all previously transferred property rights of any nature, including gas purchase rights, storage options, storage deeds, lease rights, or other assets, due to Michigan Consolidated's failure to obtain this Commission's prior approval of such transactions.

6. All facts, background, and legal issues concerning the proposed divestiture of Michigan Consolidated by ANR, to include this Commission's statutory jurisdiction and duties regarding such proposed divestiture, and in particular, whether such proposal must receive the advance approval of the Commission pursuant to the securities statute, 1909 PA 144, MSA 22.101 et seq, in the event that the Commission finds that the transactions surrounding the divestiture, including but not limited to the above listed transactions, are found by the Commission to adversely affect the long-term financial and operational strength of Michigan Consolidated.

In addition to the above issues, the Commission will fully consider all [5] arguments regarding this Commission's jurisdiction to review and rule upon the above matters, and the actions or remedies which the Commission should undertake on behalf of the public interest pursuant to its statutory duties and responsibilities.

The Commission therefore FINDS:

a. The public interest requires the Commission, on its own motion, to inquire into all past, present, or contemplated

transactions between Michigan Consolidated and ANR and its subsidiaries, to include the matters outlined in this show cause order.

b. These proceedings should be conducted as a contested case under the provisions of Chapter 4 of the Administrative Procedures Act of 1969, as amended (MCLA 24.271-24.287), with all interested parties being provided a full opportunity to present relevant testimony and legal argument concerning the matters identified in this show cause order.

c. Michigan Consolidated should present full and complete testimony, and should be assigned the burden to prove, that its past, present, and contemplated transactions with ANR and its subsidiaries are lawful and equitable, prudent, and in the public interest, and further, that such transactions will not adversely affect the long-term financial and operational strength of Michigan Consolidated as a publicly regulated gas utility capable of providing reliable gas service to Michigan customers at the most reasonable rates possible.

d. Michigan Consolidated should present full and complete testimony regarding the proposed divestiture of Michigan Consolidated by ANR, and should be assigned the burden to prove that such proposals do not require advance Commission approval pursuant to the securities statute, 1909 PA 144, MCLA [6] 460.301 et seq; MSA 22.101, in the event of Commission findings as referenced in item 6, page 5 of this order.

e. Jurisdiction in this matter is pursuant to 1909 PA 144, MCLA 460.301 et seq., 1909 PA 300, as amended, MCLA 462.2 et seq.; 1919 PA 419, MCLA 460.51 et seq.; 1923 PA 238, MCLA 486.251 et seq.; 1929 PA 9, MCLA 483.101 et seq.; 1929 PA 69, MCLA 460.501 et seq.; 1939 PA 3, MCLA 460.1 et seq.; 1969 PA 306, as amended, MCLA 24.201 et seq., and such other statutes as may be applicable, and the Commission's Rules of Practice and Procedure, 1954 Administrative Code, 1968 Annual Supplement, R460.11 et seq.

THEREFORE, IT IS ORDERED AND NOTICE IS GIVEN that:

A. Michigan Consolidated Gas Company shall provide appropriate notice of this proceeding within its service territory, including but not limited to: (1) publishing on or before September 4, 1981 a notice of hearing of this proceeding in daily newspapers of general circulation throughout its gas service territory, and (2) mailing a copy of this Order to Show Cause and Notice of Hearing to all cities, incorporated villages, townships, and counties within its gas service area, as well as to all parties or intervenors in the Commission's rate proceedings in U-5365, U-5955, U-6372 and U-6839, to be accomplished on or before September 4, 1981. Proofs of Service and Affidavits of Publication shall be filed on or before the pre-trial conference scheduled for September 23, 1981.

B. On or before September 10, 1981, Michigan Consolidated Gas Company shall file full and complete testimony to show cause why its past, present, or contemplated transactions with ANR and its subsidiaries, as identified in this order, are lawful and equitable, prudent, and in the public interest, and further, that all such transactions will not adversely affect the long-term financial and operational strength of Michigan Consolidated as a publicly regu- [7] lated gas utility capable of providing reliable gas service to Michigan customers at the most reasonable rates possible. Michigan Consolidated shall also file full and complete testimony regarding the proposed divestiture of Michigan Consolidated by ANR, and in particular, shall show cause why such divestiture proposals do not require this Commission's advance approval pursuant to the securities statute, 1909 PA 144, MSA 22.101 et seq., in the event of Commission findings as referenced in item 6, page 5 of this order. All testimony shall be proffered and presented by persons having direct and personal knowledge of the facts relevant to the issues identified in this show cause order. Further filing dates relative to the testimony of the Commission Staff

and other interested parties shall be established by the Administrative Law Judge during these proceedings.

C. Michigan Consolidated Gas Company shall participate fully in these proceedings relative to all issues identified in this show cause order.

D. On September 23, 1981, at 9:30 a.m. a hearing in the nature of a pretrial conference shall be held in the offices of the Commission, Mercantile Building, 6545 Mercantile Way, Lansing, Michigan to establish hearing dates, and procedures, and to identify any further issues, relating to these proceedings.

E. This proceeding shall be conducted as a contested case under the provision of Chapter 4 of the Administrative Procedures Act of 1969, as amended (MCLA 24.271-24.287). Any person seeking to intervene, in accordance with Rule 11 of the Rules of Practice and Procedure Before the Commission (R460.21), shall file with the Commission, on or before Spetember 18, 1981, an original and 12 copies of a petition to intervene, together with proof of service upon Michigan Consolidatd Gas Company.

Subparagraph (2) of said Rule 11 provides as follows: [8]

"(2) A petition to intervene shall set out clearly and concisely the facts supporting the petitioner's alleged right or interest, *the grounds of the proposed intervention*, and *the position of the petitioner in the proceeding*, so as *fully and completely* to advise the parties and the commission of the *specific issues of fact or law* to be raised or controverted." (Emphasis added)

The Commission will require strict compliance with the above-quoted rule.

F. Michigan Consolidated and ANR shall not henceforth sell, lease, or otherwise transfer ownership or control of any of

its assets or property rights to ANR or its subsidiaries, or otherwise proceed with divestiture plans or proposals, until further order of this Commission.

The Commission specifically reserves jurisdiction of the matters herein and the authority to issue such further orders as may be required.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ DANIEL J. DEMLOW
Chairperson

(S E A L) /s/ ERIC J. SCHNEIDEWIND
Commissioner

/s/ EDWYNA G. ANDERSON
Commissioner

By the Commission and pursuant
to its action of August 10, 1981.

/s/ THOMAS R. LONERGAN
Its Secretary

[9]

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the inquiry, on the Commission's own motion, into certain transactions between Michigan Consolidated Gas Company and American Natural Resources Company and its subsidiaries, and into the proposed divestiture of Michigan Consolidated Gas Company by American Natural Resources Company.

Case No. U-6954

At a session of the Michigan Public Service Commission held at its offices in the City of Lansing, Michigan, on the 1st day of December, 1981.

PRESENT: Hon. Eric J. Schneidewind, Chairperson
Hon. Edwyna G. Anderson, Commissioner
Hon. Matthew E. McLogan, Commissioner

ORDER APPROVING DIVESTITURE PURSUANT TO SETTLEMENT AGREEMENT

On August 10, 1981, this Commission entered its Order to Show Cause and Notice of Hearing in this case, opening a contested-case proceeding. The Commission stated among other matters that it would "decide all relevant factual and legal issues" respecting (a) the proposed divestiture of Michigan Consolidated Gas Company (Michigan Consolidated) by American Natural Resources Company (ANR),

(b) certain "past, present, or contemplated transactions" between Michigan Consolidated and ANR or ANR's subsidiaries, and (c) the extent of the Commission's jurisdiction in the premises.

Michigan Consolidated is a Michigan utility subject to Commission jurisdiction over its rates, services, facilities, and securities, distributing natural gas at retail to approximately one million customers in the Upper and Lower Peninsulas of Michigan. ANR owns 100% of Michigan Consolidated's common stock, and ANR's own common stock is widely held by the general public. Among ANR's other wholly-owned subsidiaries are ANR Storage Company (Storage Company), engaged in furnishing gas storage services, and Michigan Wisconsin Pipe Line Company (Michigan Wisconsin), an interstate pipeline. Michigan Wisconsin owns 100% of the common stock of ANR Production Company (Production Company), which is engaged in exploring for and producing oil and gas. Production Company is successor in interest to Michigan Natural Resources Company (MNR), another ANR subsidiary, in respect to certain Michigan oil and gas leases which Michigan Consolidated conveyed to MNR in 1976.

The Commission's August 10, 1981 order was issued after a May 20, 1981 decision by ANR's Board of Directors approving a plan for the divestiture of Michigan Consolidated, to be completed by December 31, 1981, and after the Commission had obtained preliminary information regarding the divestiture from an informal legislative fact-finding proceeding in Case No. U-6790 commenced on March 5, 1981, from an April 3, 1981 joint Michigan Consolidated/Storage Company application to the Federal Energy Regulatory Commission (FERC) in docket CP81-311, and from other recent Commission proceedings.

As stated in its August 10, 1981 order, the Commission commenced this proceeding on its own motion due to its concern that the proposed Michigan Consolidated divestiture, along with certain related property transactions, might result in Michigan Consolidated becoming financially and operationally weaker and thus less capable of providing reliable natural gas service to its customers at reasonable rates. In addition, the Commission, among other goals, wanted to ensure that certain property and securities transactions undertaken or contemplated in furtherance of or prior to the divestiture were lawful, equitable, prudent and in the public interest. [2]

The Commission's inquiry, as stated in the August 10, 1981 order, focused upon certain issues arising under the Michigan Securities Act, 1909 PA 144, as amended, MCLA 460.301 et seq., and pursuant to statutes requiring advance Commission authorization prior to a utility's abandonment, sale or transfer of utility facilities or assets, among other matters. In addition to securities matters, the Commission's order directed that all legal and factual matters relating to the following transactions between Michigan Consolidated and ANR or its subsidiaries should be specifically addressed in the inquiry:

(1) Joint agreements entered into between Michigan Consolidated and ANR Storage, dated February 27, 1981, governing certain storage and transmission facilities or services. Those agreements included a lease from Michigan Consolidated to Storage Company of certain gas transmission lines extending from Kalkaska, Michigan, to Willow Run, Michigan, together with the Taggart Gas Storage Field and related property and facilities; an assignment from Michigan Consolidated to Storage Company of certain gas storage and transportation agreements governing services which Michigan Consolidated performs using certain of the facilities leased to Storage Company; an exchange agreement between Michigan Consolidated and Storage Company enabling Storage Company to perform services under the gas storage agreements assigned by Michigan Consolidated; and a transportation agreement wherein ANR agreed to transport gas for Michigan Consolidated through the leased facilities. [3]

(2) An agreement dated November 5, 1980, by which Michigan Consolidated sold and transferred to Storage Company various storage deeds, storage options and mineral deeds in northern Michigan, together with Michigan Consolidated's option to purchase, for gas storage purposes, the producer's remaining interest in a number of gas-producing fields when they are 75% depleted.

(3) A contract dated January 1, 1976, by which Michigan Consolidated sold certain oil and gas leases and related property in Michigan to MNR.

In addition, the Commission's order also directed that the inquiry should consider whether any of the above transactions, or any other divestiture-related securities or property transactions, between Michigan Consolidated and ANR or its subsidiaries, might adversely affect the long-term financial and operational strength of Michigan Consolidated as a publicly regulated gas utility and, also, whether the transactions were lawful and equitable, prudent and in the public interest. Also, Michigan Consolidated was made a respondent in the proceeding and was directed to publish notice of the proceeding and to fully participate in the inquiry.

As directed by the Commission's August 10, 1981 Order and Notice of Hearing, Michigan Consolidated, on or before September 4, 1981, mailed notice of this proceeding to cities, incorporated villages, townships and counties within its service territory, and to intervenors in the Commission's past four rate proceedings, along with published notice in newspapers within its service territory.

On September 8, 1981, ANR, Michigan Consolidated, Storage Company and Production Company filed an action in the Ingham Circuit Court, contesting the [4] Commission's jurisdiction to undertake the inquiry in this case.

On September 23, 1981, a prehearing conference was held at the Commission's offices to establish hearing dates and other procedures for this case. The parties at the prehearing conference included the Commission Staff, ANR and its subsidiaries, Michigan Consolidated, Storage Company, Production Company, Attorney General Frank J. Kelley, the Association of Businesses Advocating Tariff Equity (ABATE), and several Wisconsin distribution utilities.

On September 28, 1981, the Commission filed in the Ingham Circuit Court action a Motion for Accelerated Judgment or, in the Alternative, Motion for Preliminary and Permanent Injunction in Aid of Jurisdiction, which asserted this matter was properly before the Commission and that the Ingham Circuit Court had no jurisdiction to interfere with completion of the Commission proceedings. Thereafter, further motions were filed in the Court action, and Court hearings regarding the matters at issue were held on October 2 and 16, 1981.

On October 26, 1981, the Ingham Circuit Court signed and entered a Final Order of Superintending Control and Permanent Injunction, finding that the Commission was without jurisdiction relative to the divestiture of Michigan Consolidated by ANR, whether accomplished by direct

distribution of ANR's 100% holdings of Michigan Consolidated stock to ANR shareholders or by assignment of ANR's holdings of Michigan Consolidated stock to a newly-formed holding company, followed by distribution of the holding company stock to ANR shareholders.

On November 16, 1981, the Commission filed an Emergency Appeal, and Motion For Immediate Consideration And Stay in the Court of Appeals. On the same date, an intervenor in the Ingham Circuit Court proceedings, ABATE, also filed a Claim of Appeal in the Court of Appeals, seeking review of the Ingham Circuit Court order.

For several weeks during the Court proceedings, a number of informal [5] settlement conferences were held in this case, involving representatives of the Commission Staff and all parties to this proceeding, plus representatives of ANR, Storage Company and Production Company. The conferences were held in the Commission's hearing rooms and were open to the public.

On November 24, 1981, all parties to this proceeding completed signing a Settlement Agreement, providing for Michigan Consolidated's divestiture under certain terms and conditions including, but not limited to, the following: that ANR will assign its common stock in Michigan Consolidated to a newly-created holding company, Primark Corporation, and distribute the common stock in Primark Corporation to its shareholders; that certain transactions previously entered into by Michigan Consolidated and ANR storage on February 27, 1981 would be superseded, subject to approval of FERC, by a Precedent Agreement under which Michigan Consolidated will continue to own and operate the facilities that would otherwise be leased to Storage Company, will continue to render the storage services that would otherwise be assigned to Storage company, and will furnish transportation service to Storage Company through the facilities that would otherwise

be leased to Storage Company, among related activities; that Michigan Consolidated would have the right to participate in natural gas storage business with Storage Company under a partnership arrangement, with Storage Company to convey or cause to be conveyed to the partnership all interests of every kind which Michigan Consolidated assigned to it by the agreement of November 5, 1980; and that Production Company will assign to Michigan Consolidated substantial interests in two producing wells discovered on the leases conveyed on January 1, 1976.

The Settlement Agreement, among other matters, also provides for dismissal of the Ingham Circuit Court case, 81-27947-AA, upon commission approval of the Settlement Agreement and issuance of its final order in this proceeding, along with the filing of a joint stipulation requesting the Court to vacate its initial order of [6] October 2, 1981, and its final order dated October 26, 1981. In addition to the Ingham Circuit Court case, the Settlement Agreement is also intended to comprehensively resolve the issues in the Commission's inquiry in this case (U-6954), and in the related case before FERC in its docket CP81-311 et seq. Further, it is contemplated that both the Commission's and ABATE's appeals to the Court of Appeals will also be promptly dismissed. The Settlement Agreement and attachments were admitted in this proceeding as Exhibit One. -

The Settlement Agreement inherently recognizes the jurisdiction of the Commission over the securities and property issues involved in this case, and the Commission's authority to approve Michigan Consolidated's divestiture from ANR pursuant to the Settlement Agreement. At the same time, however, the Commission notes that the Settlement Agreement provides that it shall not constitute precedent, nor an admission of fact or law by any party to this proceeding

DISCUSSION

As noted previously, the Commission has been concerned about the impact of ANR's proposed divestiture of Michigan Consolidated upon the long-term financial and operational viability of Michigan Consolidated as a Michigan gas utility capable of providing reliable gas service to its customers at reasonable rates. The Commission has also been concerned as to whether completed or contemplated property or securities transactions undertaken in furtherance of the divestiture were lawful and equitable, prudent and in the public interest. On this basis, the Commission utilized its jurisdiction to commence the inquiry in this case.

The Commission has reviewed in detail the provisions of the Settlement Agreement presented to it, which was arrived at after extensive negotiations between [7] ANR and its subsidiaries, Michigan Consolidated, the Commission Staff and all other parties to this case. Based upon this review, the Commission concludes that the Settlement Agreement satisfactorily resolves the issues, and addresses the concerns, identified in the Commission's August 10, 1981 order initiating this case. Further, the Commission also takes special note of the Commission Staff's certification in the Settlement Agreement that the agreement is reasonable and in the public interest.

Based upon the Commission's determination that the Settlement Agreement provides for a comprehensive and satisfactory resolution of the issues identified in the Commission's August 10, 1981 Order to Show Cause and Notice of Hearing, the Commission hereby accepts and adopts the settlement, and authorizes Michigan Consolidated's divestiture in strict accordance with the terms and conditions thereof.

The Commission FINDS that:

a. Jurisdiction in this matter is pursuant to 1909 PA 144, as amended, MCLA 460.301 et seq.; 1909 PA 300, as amended,

MCLA 462.2 et seq.; 1919 PA 419, as amended, MCLA 460.51 et seq.; 1923 PA 238, as amended, MCLA 486.251 et seq.; 1929 PA 9, as amended, MCLA 483.101 et seq.; 1929 PA 69, MCLA 460.501 et seq.; 1939 PA 3, as amended, MCLA 460.1 et seq.; 1969 PA 306, as amended, MCLA 24.201 et seq.; such other statutes as may be applicable; and the Commission's Rules of Practice and Procedure, 1979 Administrative Code, R 460.11 et seq.

b. The Settlement Agreement of the parties to this proceeding (Exhibit One in the record of this case) provides for a just and equitable resolution of the issues in this case, is in the public interest and should be adopted.

c. Upon strict compliance with the terms and conditions of the Settlement Agreement, ANR should be permitted to assign its ownership interest in the common stock of Michigan Consolidated to Primark Corporation and to issue common stock of Primark Corporation to ANR shareholders. [8]

THEREFORE, IT IS ORDERED that:

A. The Settlement Agreement of the parties to this proceeding (Exhibit One in the record of this case) is hereby approved.

B. ANR may assign its ownership interest in the common stock of Michigan Consolidated to Primark Corporation and issue common stock of Primark Corporation to ANR shareholders, pursuant to and in accordance with the Settlement Agreement after ANR, its subsidiaries, and Michigan Consolidated agree to and file, within 5 days hereof, all necessary stipulations providing for dismissal of now-pending Court proceedings and vacation of existing Court orders, unless extended by Commission order.

C. Michigan Consolidated, ANR, or its subsidiaries, shall provide the Commission such reports or documentary information as may be reasonably required to insure that the divestiture as hereby approved is undertaken and completed in accordance with the Settlement Agreement.

The Commission specifically reserves jurisdiction of the matters herein contained and the authority to issue such further order or orders as the facts and circumstances may require.

Any party desiring to appeal this order must perfect an appeal to the Michigan [9] Court of Appeals within 20 days after issuance and notice of this order, pursuant to 1909 PA 144, as amended, MCLA 460.301.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ ERIC J. SCHNEIDEWIND
Chairperson

/s/ EDWYNA G. ANDERSON
Commissioner

[SEAL]

/s/ MATTHEW E. MCLOGAN
Commissioner

By the Commission and pursuant to its action of December 1, 1981.

/s/ THOMAS R. LONERGAN
Its Secretary

[10]

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioner's: Charles B. Curtis, Chairman; Matthew Holden, Jr., and George R. Hall.

	Docket Nos.
ANR Storage Company	CP78-432
Michigan Consolidated Gas Company, Interstate Storage Division	CP78-433
Great Lakes Gas Transmission Company	CP78-527
Michigan Wisconsin Pipe Line Company	CP78-545
Tennessee Gas Pipeline Company, United Gas Pipe Line Company and Midwestern Gas Transmission Company	CP79-22
Panhandle Eastern Pipe Line Company	CP79-84
Panhandle Eastern Pipe Line Company and Trunkline Gas Company	CP79-98
Midwestern Gas Transportation Company	CP79-104
Natural Gas Pipeline Company of America	CP79-163
Tennessee Gas Pipeline Company	CP68-248

FINDINGS AND ORDER AFTER STATUTORY HEARING ISSUING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY, AMENDING CERTIFICATE, AND GRANTING AND DENYING INTERVENTIONS

(Issued July 23, 1979)

On July 19, 1978, ANR Storage Company (ANR) filed an application in docket No. CP78-432, pursuant to Section 7(c) of the Natural Gas Act for authorization to render gas storage

service for United Gas Pipe Line Company (United), Panhandle Eastern Pipe Line Company (Panhandle), Mississippi River Transmission Company (Mississippi) and Northern Indiana Public Service Company (NIPSCO) (hereinafter collectively referred to as the customers), to develop and operate certain gas storage fields and appurtenant facilities, drill and operate certain wells, and to construct and operate certain other facilities, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

[24] Docket Nos. CP78-432, *et al.*

The Commission finds:

(1) ANR Storage Company, a Michigan Corporation, having its principal place of business in Detroit, Michigan, will be a "natural-gas company" within the meaning of the Natural Gas Act upon the completion and operation of the storage facilities and the rendition of the services more fully described in its application filed in Docket No. CP78-432.

(2) Great Lakes, a Delaware corporation, having its principal place of business in Wilmington, Delaware, is a "natural-gas company" within the meaning of the Natural Gas Act as heretofore found by the Commission in its order of June 20, 1967, in Docket No. CP66-110 (33 FPC 1070).

(3) Michigan-Wisconsin, a Delaware corporation, having its principal place of business in Detroit, Michigan is a "natural-gas company" within the meaning of the Natural Gas Act as heretofore found by the Commission in its order of April 6, 1943, in Docket No. G-280 (3 FPC 967).

(4) Mich-Con's Interstate Storage Division, a Michigan Corporation, having its principal place of business in Detroit, Michigan is a "natural gas company" within the meaning of the Natural Gas Act for the purposes of the storage transportation service it proposes to render in Docket No. CP78-433.

(5) Tennessee, United, Midwestern, Panhandle and Trunkline, all Delaware corporations having their principal place of business in Houston, Texas are "natural-gas companies" within the meaning of the Natural Gas Act as heretofore respectively found by the Commission orders of July 12, 1947, in Docket No. G-910 (6 FPC 777), January 20, 1942, in Docket No. G-216 (3 FPC 3), May 12, 1959, in Docket No. G-16841 (21 FPC 653) September 23, 1942, in Docket No. G-200 in (3 FPC 273) and on April 29, 1949, in Docket No. G-882 (8 FPC 250).

(6) Natural, a Delaware corporation, having its principal place of business in Chicago, Illinois, is a "natural-gas company" within the meaning of the Natural Gas Act as heretofore found by the Commission in its order of October 13, 1943, in Docket No. G-235 (3 FPC 830).

(7) ANR, Mich-Con, Great Lakes, Michigan Wisconsin, Tennessee, Midwestern, United Panhandle, Trunkline and Natural (Applicants herein) are able and willing properly to do the acts and to perform the services proposed and to conform to the provisions of the Natural Gas Act and the requirements, rules and regulations of the Commission thereunder with respect to the services described in the applications presently before the Commission in the above-styled proceedings.

Regulations **12,867**

Subpart A — Applications for Certificates of Public Convenience and Necessity and for Orders Permitting and Approving Abandonment Under Section 7 of the Natural Gas Act, as Amended, Concerning Any Operation, Sales Service, Construction, Extension, Acquisition or Abandonment

[¶ 19,555]

§ 157.5 Purchase and intent of rules.

(a) Applications under section 7 of the Natural Gas Act shall set forth all information necessary to advise the Commission fully concerning the operation, sales, service, construction, extension, or acquisition for which a certificate is requested or the abandonment for which permission and approval is requested. Some applications may be of such character that an abbreviated application may be justified under the provisions of § 157.7. Applications for permission and approval to abandon pursuant to section 7(b) of the Act shall conform to § 157.18 and to such other requirements of this part as may be pertinent. However, every applicant shall file all pertinent data and information necessary for a full and complete understanding of the proposed project, including its effect upon applicant's present and future operations and whether, and at what docket, applicant has previously applied for authorization to serve any portion of the market contemplated by the proposed project and the nature and disposition of such other project.

(b) Every requirement of this part shall be considered as a forthright obligation of the applicant which can only be avoided by a definite and positive showing that the information or data called for by the applicable rules is not necessary for the consideration and ultimate determination of the application.

(c) This part will be strictly applied to all applications as submitted and the burden of adequate presentation in intelligible form as well as justification for omitted data or information rests with the applicant. (OMB Control No. 1902-0060)

[¶ 19,556]

§ 157.6 Applications; number of copies; general requirements.

(a) *Applicable rules.* An original and 7 conformed copies of an application under this part shall be furnished to the Commission. The Commission reserves the right to request additional copies. In all other respects applications shall conform to the requirements of §§ 157.5 through 157.14. Amendments to or withdrawals of applications shall conform to the requirements of §§ 385.213 and 385.214 of this chapter. If the application involves an acquisition of facilities, it shall conform to the additional requirements prescribed by §§ 157.15 and 157.16.

(b) *General content of application; filing fee.* Each application filed shall be accompanied by the fee prescribed in part 159 of this subchapter and shall set forth the following information:

[The next page is 12,867-3.]

(1) The exact legal name of applicant; its principal place of business; whether an individual, partnership, corporation, or otherwise; State under the laws of which organized or authorized; and the name, title, and mailing address of the person or persons to whom communications concerning the application are to be addressed.

(2) The facts relied upon by applicant to show that the proposed service, sale, operation, construction, extension, or acquisition is or will be required by the present or future public convenience and necessity.

(3) A concise description of applicant's existing operations.

(4) A concise description of the proposed service, sale, operation, construction, extension, or acquisition, including

the proposed dates for the beginning and completion of construction, the commencement of operations and of acquisition, where involved.

(5) A full statement as to whether any other application to supplement or effectuate applicant's proposals must be or is to be filed by applicant, any of applicant's customers, or any other person, with any other Federal, State, or other regulatory body; and if so, the nature and status of each such application.

(6) A table of contents which shall list all exhibits and documents filed in compliance with §§ 157.5 through 157.18, as well as all other documents and exhibits otherwise filed, identifying them by their appropriate titles and alphabetical letter designations. The alphabetical letter designations specified in §§ 157.14, 157.16, and 157.18 must be strictly adhered to and extra exhibits submitted at the volition of applicant shall be designated in sequence under the letter Z (Z1, Z2, Z3, etc.)

(7) A form of notice suitable for publication in the FEDERAL REGISTER, as contemplated by § 157.9, which will briefly summarize the facts contained in the application in such way as to acquaint the public with its scope and purpose.

(c) *Requests for shortened procedure.* If shortened procedure is desired a request therefor shall be made in conformity with § 385.802 of this chapter and may be included in the application or filed separately. (OMB Control No. 1902-0060)

.01 47 F.R. 19014 (May 3, 1982).

.05 *Historical record.* — Subsection (a) was amended in 47 F.R. 19014 (5/3/82), effective 8/26/82. Prior to its amendment, it read as follows:

(a) *Applicable rules.* An original and 7 conformed copies of an application under this part shall be furnished to the Commission. The Commission reserves the right

to request additional copies. In all other respects applications shall conform to the requirements of §§ 157.5 through 157.14, and other applicable requirements of the Commission's rules of practice and procedure, particularly §§ 1.5, 1.15, 1.1.6, and 1.17 of this chapter. Amendments to or withdrawals of applications shall conform to the requirements of § 1.11 of this chapter. If the application involves an acquisition of facilities, it shall conform to the additional requirements prescribed by §§ 157.15 and 157.16.

Subsection (c) was amended in 47 F.R. 19014 (5/3/82), effective 8/26/82, by removing "[8] 1.32(b)" and adding in lieu thereof "[8] 385.802".

service proposed or to establish a gas supply, estimates and data required by this subparagraph shall also be stated in like detail for such affiliates.

(x) When the proposed project is for service which would not decrease the life index of the total system gas supply by more than one year, the data required in subdivisions (i) to (ix), inclusive, of this subparagraph need be submitted only as to the particular market to receive new or additional service.

(12) *Exhibit J — Conversion to natural gas.* If it is assumed that proposed customers in new areas or firm and interruptible direct industrial customers whose estimated consumption totals 10,000 Mcf or more in any calendar month or 100,000 Mcf or more in any calendar year will convert from other fuels to natural gas, state the basis for such assumption and include a study showing estimated cost of converting customers' facilities to natural gas. The study should indicate the number of customers of each of the other fuels who applicant anticipates will convert to natural gas and the current cost of fuel to be

displaced compared to the cost of natural gas on an equivalent Btu basis.

(13) *Exhibit K — Cost of facilities.* A detailed estimate of total capital cost of the proposed facilities for which application is made, showing cost of construction by operating units such as compressor stations, main pipelines, laterals, measuring and regulating stations, and separately stating the cost of right-of-way, damages, surveys, materials, labor, engineering and inspection, administrative overhead, fees for legal and other services, allowance for funds used during construction, and contingencies. Include a brief statement indicating the source of information used as the basis for the above estimate. If not otherwise set forth, submit data on preliminary bids, if any, for the proposed facilities and recent experienced cost data for facilities of similar character.

(14) *Exhibit L — Financing.* Plans for financing the proposed facilities for which the application is filed, together with:

(i) A detailed description of applicant's outstanding and proposed securities and liabilities, showing amount (face value and number), interest or dividend rate, dates of issue and maturity, voting privileges, and principal terms and conditions applicable to each.

(ii) The manner in which applicant proposes to dispose of securities by private sale, competitive bidding or otherwise; the persons, if known, to whom they will be sold or issued together with letters of intent, if any, and if not known, the class or classes of such persons.

(iii) A statement showing for each proposed issue, by total amount and by unit, the estimated sale price and estimated net proceeds to the applicant.

(iv) An itemized statement of estimated expenses, fees, and commissions to be paid by applicant in connection with each proposed issue.

(v) A statement showing whether the consent of any holder of any security is necessary to permit the issuance of the additional securities proposed, and whether, as to the proposed issue of securities, a like restriction is to be made applicable to any securities issued thereafter.

¶ 19,564 § 157.14 Federal Energy Guidelines

12,889

(vi) Statement of anticipated cash flow, including provision during the period of construction and the first 3 full years of operation of proposed facilities for interest requirements, dividends, and capital retirements.

(vii) Statement showing, over the life of each issue, the annual amount of securities which applicant expects to retire through operation of a sinking fund or other extinguishment of the obligation.

(viii) A balance sheet and income statement (12 months) of most recent date available.

(ix) Comparative pro forma balance sheets and income statements for the period of construction and each of the first 3 full years of operation, giving effect to the proposed construction and proposed financing of the project.

(x) Conformed copies of all agreements, contracts, mortgages, deeds of trust, indentures, agreements to advance materials or supplies or render services in return for applicant's securities, underwriting agreements, and any other agreements or documents of a similar nature.

(xi) Conformed copies of all reports, letters, or other documents, submitted by applicant to underwriters, insurance companies, or others regarding financing, including business studies, forecasts of earnings, and other similar financial or accounting reports, statements, or documents.

(xii) Conformed copies of all applications and supporting exhibits, registration statements, or other similar submittals, if any, to the Securities and Exchange Commission, including all supplements, changes or modifications of the above.

(xiii) Any additional data and information upon which applicant proposes to rely in showing the adequacy and availability to it of resources for financing its proposed project.

(15) *Exhibit M — Construction, operation, and management.* A concise statement setting forth arrangements for supervision, management, engineering, accounting, legal, or other similar service to be rendered in connection with the construction or operation of the project, if not to be performed by employees of applicant, including reference to any existing or contemplated agreements therefor, together with:

(i) A statement showing affiliation between applicant and any parties to such agreements and arrangements. See Exhibit D, paragraph (a)(4) of this section.

(ii) Conformed copies of all construction, engineering, management, and other similar service agreements or contracts in any way operative with respect to construction, operation, or financing of facilities which are the subject of the application or will be applicable under system operations.

(16) *Exhibit N — Revenues — Expenses — Income.* When the estimated revenues and expenses related to a proposed facility will significantly affect the operating revenues or operating expenses of an applicant, there shall be submitted a system-wide statement for the last year preceding the proposed construction or service and pro forma system-wide and incremental

[The next page is 12,889-3.]

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF INGHAM

AMERICAN NATURAL RESOURCES COMPANY, a Michigan corporation, MICHIGAN CONSOLIDATED GAS COMPANY, a Michigan corporation, ANR STORAGE COMPANY, a Michigan corporation, and ANR PRODUCTION COMPANY, a Delaware corporation,
Plaintiffs,

vs.

THE MICHIGAN PUBLIC SERVICE COMMISSION, DANIEL J. DEMLOW, ERIC J. SCHNEIDEWIND and EDWYNA G. ANDERSON,
Defendants.

-and-

ABATE,
Intervening Defendant.

Honorable
Thomas L. Brown
Circuit Judge

File No.
81-27947-AA

In re:

AMERICAN NATURAL RESOURCES COMPANY a Michigan corporation, MICHIGAN CONSOLIDATED GAS COMPANY, a Michigan corporation, ANR STORAGE COMPANY, a Michigan corporation and ANR PRODUCTION COMPANY, a Delaware corporation,
Plaintiffs.

FINAL ORDER OF SUPERINTENDING CONTROL AND PERMANENT INJUNCTION

At a session of said Court held in the Courtroom, Ingham County, Lansing, on this 26th day of October, 1981.

PRESENT: HONORABLE THOMAS L. BROWN,
Circuit Judge

Defendant Michigan Public Service Commission's Motion for Rehearing, dated October 12, 1981, having come on to be heard before the Court on October 16, 1981, and

Plaintiffs' Complaint for Superintending Control having also come on for further hearing on October 16, 1981, and

The parties having submitted briefs and had oral argument before the Court, and testimony having been presented, and the Court being otherwise fully advised in the premises, and

The Court having found that Defendant Michigan Public Service Commission has no jurisdiction of any kind over the proposed divestiture by Plaintiff American Natural Resources Company (hereafter "ANR") of its ownership interest in the common stock of Plaintiff Michigan Consolidated Gas Company (hereafter "Consolidated"), whether said divestiture is accomplished by direct transfer of Consolidated stock to ANR shareholders or by indirect transfer whereby Consolidated stock is transferred to a newly-created subsidiary of ANR and, thereafter, the common stock of the new subsidiary is transferred to ANR shareholders;

NOW, THEREFORE, IT IS HEREBY ORDERED, pursuant to the Court's authority and pursuant to GCR 1963 711, as follows:

1. Defendant Michigan Public Service Commission's October 12, 1981 Motion for Rehearing of this Court's Order dated October 2, 1981, is denied.

2. To the extent the divestiture by ANR of its ownership interest in the common stock of Consolidated is to be accomplished either by:

(a) the transfer of all Consolidated stock owned by ANR directly to ANR's shareholders, or

(b) the creation of a new ANR subsidiary (hereafter called "NEWCO" for reference only), the subsequent transfer of all Consolidated stock owned by ANR to NEWCO, and, thereafter, the transfer of all NEWCO stock owned by ANR directly to ANR's shareholders,

Paragraph F, p. 9, of Defendant Commission's Order of August 10, 1981, issued in Case No. U-6954, is hereby declared to be null and void and its further enforcement is hereby permanently enjoined insofar as it purports to prohibit proceeding with either of the divestiture plans or proposals, described herein, and Paragraph B, p. 8 of Defendant Commission's Order is hereby declared to be null and void, and its further enforcement is hereby permanently enjoined insofar as it purports to require Michigan Consolidated Gas Company to file full and complete testimony regarding the proposed divestiture and show cause why such divestiture proposals do not require Defendant Commission's advance approval.

IT IS FURTHER ORDERED that the request for injunctive relief pursuant to the Order to Show Cause, previously issued herein, except as otherwise provided herein, is hereby held in abeyance.

IT IS FURTHER ORDERED that the Motion of Defendant Michigan Public Service Commission for accelerated judgment and for Preliminary and Permanent Injunction to aid Commission jurisdiction is likewise held in abeyance as to Counts I, II and III and is again denied as to Count IV.

IT IS FURTHER ORDERED and adjudged there is no just reason for delay and the Court directs and determines that the order contained herein is a final order entered pursuant to Count IV of Plaintiff's Complaint on the issue of the divestiture by ANR of its common stock of Consolidated by either of the means described herein.

/s/ THOMAS L. BROWN

THOMAS L. BROWN, Circuit Judge

Approved as to Form:

/s/ DON L. KESKEY

Don L. Keskey
Assistant Attorney General for
Defendant Michigan Public Service Commission

/s/ DOUGLAS H. WEST

Douglas H. West
Attorney for Intervenor A.B.A.T.E.

CONFORMED

PRECEDENT AGREEMENT

THIS AGREEMENT, made and entered into as of the 29th day of October, 1981, by and between ANR STORAGE COMPANY, a Michigan corporation having its principal office at One Woodward Avenue, Detroit, Michigan 48226 (hereinafter referred to as "ANR"), and MICHIGAN CONSOLIDATED GAS COMPANY, A Michigan corporation having its principal office at One Woodward Avenue, Detroit, Michigan 48226 (hereinafter referred to as "Michigan Consolidated");

W I T N E S S E T H :

WHEREAS, ANR and Michigan Consolidated have entered into a Lease Agreement dated as of February 27, 1981 (the "Lease Agreement"), which provides for the lease by Michigan Consolidated to ANR of certain gas transmission pipelines extending from Kalkaska, Michigan to Willow Run, Michigan, together with related compressor stations known as the W.C. Taggart and Milford Compressor Stations, and the Taggart Gas Storage Field, including wells, equipment, pipelines, and other properties and facilities therein;

WHEREAS, ANR and Michigan Consolidated have entered into a Transportation Agreement dated as of February 27, 1981 (the "Transportation Agreement"), wherein ANR has agreed to provide transportation of certain volumes of gas through the leased gas transmission facilities to and from various delivery and redelivery points in the State of Michigan in order for Michigan Consolidated to meet its obligations under various gas purchase contracts with its producers of natural gas in Michigan and its gas supply contracts with various pipeline companies and to provide reliable and adequate gas service to its distribution customers in Michigan;

WHEREAS, in order to settle the various issues before the MPSC in Case No. U-6954, before the Federal Energy Regulatory Commission (the "FERC") in Docket No. CP81-311 and before the Ingham County Circuit Court in File No. 81-27947 AA, ANR and Michigan Consolidated have expressed a willingness to terminate the Lease Agreement and the Transportation Agreement and enter into a new Transportation Agreement upon occurrence of the conditions precedent, and for the purposes and on the terms and conditions, set forth herein;

WHEREAS, ANR is developing and has future plans for the development of certain gas storage fields in the State of Michigan for the provision of gas storage services to others;

WHEREAS, ANR may desire to provide storage related transportation of gas to and from gas storage fields in the State of Michigan;

WHEREAS, to implement storage and/or storage related transportation of gas for others now and in the future, ANR may desire that Michigan Consolidated transport such volumes of gas to and from points of delivery and redelivery in Kalkaska, Washtenaw and Mecosta Counties, Michigan, as ANR may request from time to time during the term hereof and further that [-2-] Michigan Consolidated construct any additions and improvements to its pipeline system necessary therefore;

WHEREAS, Michigan Consolidated is willing to provide such transportation services in a manner which does not interfere with the provision by Michigan Consolidated of reliable and adequate service to its Michigan distribution customers and to construct any additions and improvements to its pipeline system necessary therefore subject to the conditions hereinafter set forth;

NOW, THEREFORE, for and in consideration of the sum of ten and no/100 Dollars ($10.00) and other good and valuable consideration paid to Michigan Consolidated by ANR and of the premises and mutual covenants herein contained, ANR and Michigan Consolidated hereby covenant and agree as follows:

1. Upon fulfillment of the conditions precedent set forth in paragraph 7 hereof and subject to either party's right to terminate this Agreement as set forth in paragraph 8 hereof, Michigan Consolidated agrees to transport gas for ANR, or for ANR's account, as provided for herein, at such time or times and for such terms not longer than the term hereof, as ANR shall request. Such transportation shall be provided on the terms and conditions set forth in the Transportation Agreement attached hereto as Exhibit "C" (the "Pro Forma Agreement"), to and from the following points:

(i) the existing point of interconnection of the pipeline systems of Michigan Consolidated and [-3-] Michigan Wisconsin Pipe Line Company (Michigan Wisconsin) at Michigan Wisconsin's W.G. Woolfolk Compressor Station, located in Section 4, Austin Township, Mecosta County, Michigan (the "Woolfolk Delivery Point");

(ii) the existing point of interconnection of the pipeline systems of Michigan Consolidated and Michigan Wisconsin at Michigan Wisconsin's Willow Run Meter Station located in Section 1, Ypsilanti Township, Washtenaw County, Michigan (the "Willow Run Delivery Point");

(iii) a point of interconnection between the pipeline systems of Michigan Consolidated and ANR to be constructed by ANR in Section 31, Kalkaska Township, Kalkaska County, Michigan (the "Kalkaska Delivery Point"); and

(iv) such other point or points as may be established by mutual agreement of Michigan Consolidated and ANR.

Such transportation shall be provided by Michigan Consolidated for the sole purpose of providing storage related transportation of gas for ANR or for ANR's account; provided however, that Michigan Consolidated may consent, as certified in writing by its President or Executive Vice President, to provide non-storage related transportation of gas for ANR or for ANR's account. [-4-]

2. At such time as ANR first desires transportation of gas hereunder, ANR shall give Michigan Consolidated prior written notice of the date on which ANR will require commencement of the transportation service, listing the Contract Quantity, Maximum Winter and Summer Volumes, maximum daily volumes to be specified in Section 2.3 and Section 3.3 of the Pro Forma Agreement, the primary term thereof and such other information relating to ANR's request as Michigan Consolidated may reasonably require. ANR may thereafter request additional transportation services at any time and from time to time during the term hereof, and Michigan Consolidated will provide the additional transportation services so requested. With respect to each such request, ANR shall advise Michigan Consolidated of the date on which ANR will require commencement of the additional transportation service, listing any changes in the Contract Quantity, Maximum Winter and Summer Volumes, maximum daily volumes specified in Sections 2.3 and 3.3 of the hereinafter defined ANR Transportation Agreement, primary term and such other information as Michigan Consolidated may require.

3. Within sixty (60) days of receipt of each ANR request, Michigan Consolidated shall advise ANR of (i) any additions and improvements to Michigan Consolidated's gas [-5-]

transmission facilities necessary to provide the transportation or additional transportation service requested and the projected in-service date thereof, (ii) whether Michigan Consolidated is willing and able to bear the construction costs thereof, (iii) the rates at which Michigan Consolidated will provide such service, (iv) compressor fuel percentages and (v) delivery pressures. Such rates will be based on Michigan Consolidated's cost of providing the service requested by ANR and will be determined in the manner approved or prescribed by the FERC from time to time in setting Michigan Consolidated's rates for service rendered to ANR or others from Michigan Consolidated's gas transmission facilities then subject to FERC jurisdiction.

4. As to any additions or improvements to Michigan Consolidated's gas transmission facilities necessary to provide the transportation service or additional transportation service requested by ANR, Michigan Consolidated shall use its best efforts to construct such additions and improvements on the date specified by ANR. Exhibit A attached hereto shows the additions and improvements to Michigan Consolidated's existing transmission facilities necessary to provide the increments in transmission capacity set forth thereon and shall serve as the basis on which additions and improvements to Michigan Consolidated's facilities will be made to provide transportation service and additional transportation services to ANR. Exhibit A hereto has been developed based on Michigan Consolidated's current requirements for the transportation of gas through its gas transmission facilities in order to meet its current [-6-] obligations under various gas purchase contracts with its producers in the State of Michigan and its gas supply contracts with various pipeline companies, to accept deliveries of its own production in the State of Michigan and to provide reliable and adequate gas service to its distribution customers in the State of Michigan, and on the current requirements related to the transportation and storage

services provided by Michigan Consolidated to its interstate customers through its gas transmission facilities. Such current requirements are more fully described for normal operating conditions on the flow diagrams attached hereto as Exhibits B-1 through B-19, inclusive. In the event that material changes occur in the requirements described on such flow diagrams, Michigan Consolidated shall revise the flow diagrams, and Michigan Consolidated and ANR shall revise Exhibit A accordingly. The revised flow diagrams and revised Exhibit A shall then be attached hereto in lieu of any previously attached flow diagrams and Exhibit A.

5. Unless Michigan Consolidated otherwise notifies ANR as provided herein, Michigan Consolidated shall bear all construction costs of, and shall own and operate, all additions and improvements constructed to provide transportation service or additional transportation services to ANR. In the event that Michigan Consolidated notifies ANR that it is unwilling or unable to bear the construction costs of any such addition or improvement, ANR shall have the option of paying for and owning, [-7-] but Michigan Consolidated shall remain obligated to construct or cause to be constructed, and shall operate, such addition or improvement.

6. Upon ANR's acceptance of the rates for such transportation service or additional transportation service and of Michigan Consolidated's construction plans for any additions or improvements necessary therefor, and further, in the event Michigan Consolidated notifies ANR of its unwillingness or inability to bear the construction costs thereof, upon ANR's notification that ANR will pay for and own any such additions and improvements, then Michigan Consolidated and ANR shall execute a Transportation Agreement for such transportation service, in the form of the Pro Forma Agreement (the "ANR Transportation Agreement"), or an amendment thereto with respect to each additional transportation service,

with the appropriate volumes, rates, compressor fuel percentages, delivery pressures and primary term inserted therein. The primary term of the ANR Transportation Agreement, as it may be amended from time to time as provided herein, shall be as specified by ANR, but shall not exceed the twenty-five (25) year primary term hereof, and any extensions thereto, unless otherwise agreed by Michigan Consolidated and ANR.

7. This Agreement and the respective obligations of the parties hereunder are subject to all valid laws, orders, rules and regulations of duly constituted authorities having jurisdiction, and are conditioned upon, and will not become effective until the occurrence of, all of the following events: [-8-]

(a) the issuance by the MPSC of a final settlement order in Case No. U-6954 on or before December 1, 1981 on terms and conditions acceptable to Michigan Consolidated and ANR, which order is no longer subject to appeal;

(b) the issuance by the FERC of a final settlement order in Docket No. CP81-311 on terms and conditions acceptable to Michigan Consolidated and ANR, which order is no longer subject to appeal;

(c) the issuance by the Ingham County Circuit Court of a final order in File No. 81-27947 AA acceptable to Michigan Consolidated and ANR, which order is no longer subject to appeal;

(d) the grant of all such governmental authorizations as may be necessary for the implementation of this Agreement; and

(e) any and all other administrative and judicial proceedings relating to any of the issues in MPSC Case No. U-6954, FERC Docket No. CP81-311, and Ingham County Circuit Court File No. 81-27947 AA

being settled or otherwise concluded by final orders on terms and conditions acceptable to Michigan Consolidated and ANR, which orders are no longer subject to appeal.

Subject to paragraph 8 below, the Lease Agreement and the [-9-] Transportation Agreement will be terminated by Michigan Consolidated and ANR upon the occurence of all of the foregoing events.

8. If any such final order or governmental grant of authority contains terms or conditions which, in either party's judgment, are unacceptable, then either party may terminate this Agreement by giving to the other party ten (10) days' prior written notice and thereafter this Agreement shall be of no further force or effect, and the Lease Agreement and the Transportation Agreement shall remain in full force and effect; provided however, that such written notice must be given within thirty (30) days after issuance of the final order or governmental grant of authority which is deemed unacceptable.

9. Any request, demand or other communication which any party may desire to give to the other, or any notice provided for in this Agreement, shall be deemed to have been effectively given on the earlier of (a) actual receipt thereof or (b) the third day following the day when the same shall have been mailed by registered mail, return receipt requested, postage prepaid, addressed to the party at the address and to the attention of the person set forth below, or at such other address and to such other person as may be designated from time to time by either party by written notice to the other:

ANR Storage Company
One Woodward Avenue
Detroit, Michigan 48226
Attention: Executive Vice President [-10-]

Michigan Consolidated Gas Company
One Woodward Avenue
Detroit, Michigan 48226
Attention: President

10. Any company which shall succeed by purchase, merger, or consolidation to the properties, substantially as an entirety, of Michigan Consolidated or of ANR, as the case may be, shall be entitled to the rights and shall be subject to the obligations of its predecessor in title under this Agreement. Either Michigan Consolidated or ANR may, without relieving itself of its obligations under this Agreement, assign any of its rights and obligations hereunder to a corporation with which it is affiliated at the time of such assignment. Otherwise, no assignment of this Agreement or of any of its rights or obligations hereunder shall be made by Michigan Consolidated or ANR without the written consent of the other first obtained. It is agreed, however, that the provisions of this paragraph 10 shall not in any way prevent either party to this Agreement from pledging or mortgaging its rights hereunder as security for its indebtedness. This Agreement shall be binding upon and shall inure to the benefit of the respective successors and assigns of the parties hereto.

11. Should Michigan Consolidated desire to sell all or any part of its interests in the gas transmission facilities used to provide transportation service or additional transportation services to ANR, Michigan Consolidated shall first give written notice to ANR with full information concerning its proposed sale, which shall include the name [-11-] and address of the prospective purchaser (who must be ready, willing and able to purchase), the purchase price, and all other terms of the offer. ANR shall then have an optional right, for a period of thirty (30) days after receipt of the notice, to elect to purchase on the same terms and conditions (including all non-monetary considerations contained in the prospective purchaser's offer) the

interest which Michigan Consolidated proposes to sell. However, there shall be no preferential right to purchase in those cases where Michigan Consolidated wishes to mortgage its interests, or to dispose of its interests by merger, reorganization, consolidation, or sale of all of its assets, or a sale or transfer of its interests to an affiliate.

12. In the event that ANR exercises its option to pay for and own any additions and improvements that Michigan Consolidated notifies ANR it is unwilling or unable to bear the construction costs of, then should ANR desire to sell all or any part of its interests in any such additions and improvements, ANR shall first give written notice to Michigan Consolidated with full information concerning its proposed sale, which shall include the name and address of the prospective purchaser (who must be ready, willing and able to purchase), the purchase price, and all other terms of the offer. Michigan Consolidated shall then have an optional right, for a period of thirty (30) days after receipt of the notice, to elect to purchase on the same terms and conditions (including all non-monetary considerations contained in the prospective purchaser's offer) [-12-] the interest which ANR proposes to sell. However, there shall be no preferential right to purchase in those cases where ANR wishes to mortgage its interests, or to dispose of its interests by merger, reorganization, consolidation, or sale of all of its assets, or a sale or transfer of its interests to an affiliate.

13. On termination of this Agreement, if Michigan Consolidated desires to continue to operate all or any portion of the gas transmission facilities used to provide transportation service or additional transportation services to ANR, then Michigan Consolidated shall purchase ANR's interest in all additions and improvements thereto owned by ANR and shall be entitled to receive a conveyance of such additions and improvements, free and clear of the liens of the mortgage, if any, of ANR, upon payment to ANR of the fair market value of the property interests to be conveyed, which fair market value shall be such

value as any regulatory body having jurisdiction over the continued operation of the facilities, or any portion thereof, shall use for ratemaking purposes.

14. Subject to the provisions of paragraph 8 hereof, this Agreement shall become effective and the respective obligations of the parties hereunder shall become binding upon fulfillment of the conditions precedent set forth in paragraph 7 hereof and shall remain in full force and effect for a primary term of twenty-five (25) years thereafter. ANR shall have the right, but not the obligation, to extend the term of this [-13-] Agreement for not more than three (3) additional five (5) year periods, which right shall be exercisable as to each five (5) year extension by ANR giving Michigan Consolidated written notice of ANR's decision to exercise its right to extend the term hereof for an additional five (5) years, not less than five (5) years prior to the end of the primary term or any extension thereof, as the case may be.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in several counterparts and their corporate seals to be hereunto affixed, attested by the

hands of their proper officers duly authorized in that behalf, as of the day and year first above written.

ANR STORAGE COMPANY

By /s/ J. F. Cordes
Executive Vice President

ATTEST:

/s/ Peter R. Scullen
Secretary

(SEAL)

MICHIGAN CONSOLIDATED GAS COMPANY

By /s/ R. W. Stewart
President

ATTEST:

/s/ Karl L. Seavitt
Secretary

(SEAL)

[-14-]

STATE OF MICHIGAN
BEFORE THE
MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the inquiry, on the Commission's own motion, into certain transactions between Michigan Consolidated Gas Company and American Natural Resources Company and its subsidiaries, and into the proposed divestiture of Michigan Consolidated Gas Company by American Natural Resources Company

Case No. U-6934

SETTLEMENT AGREEMENT

I.

The parties to this Settlement Agreement stipulate to the following facts:

On August 10, 1981, the Michigan Public Service Commission (Commission) entered its Order to Show Cause and Notice of Hearing in this case, opening a contested-case proceeding. The Commission stated that it would "decide all relevant factual and legal issues" respecting (a) the proposed divestiture of Michigan Consolidated Gas Company (Michigan Consolidated) by American Natural Resources Company (ANR), (b) certain "past, present, or contemplated transactions" between Michigan Consolidated and ANR or ANR's subsidiaries, and (c) the extent of the Commission's jurisdiction in the premises.

Michigan Consolidated, is a Michigan utility subject to Commission jurisdiction over its rates and services, distributing natural gas at retail to approximately one million

customers in the Upper and Lower Peninsulas of Michigan. ANR owns 100% of Michigan Consolidated's common stock, and ANR's own common stock is publicly held. Among ANR's other wholly-owned subsidiaries are ANR Storage Company (Storage Company), engaged in furnishing gas storage services in interstate commerce, and Michigan Wisconsin Pipe Line Company (Michigan Wisconsin), owning 100% of the common stock of ANR Production Company, (Production Company). The last is engaged in exploring for and producing oil and gas and is successor in interest to oil and gas leases in Michigan, discussed in Paragraph (3), *Infra*, formerly owned by Michigan Natural Resources Company (MNR).

ANR plans to divest its entire ownership in Michigan Consolidated by assigning all Michigan Consolidated common stock to a newly-created holding company (NEWCO) and by distributing the common stock of NEWCO to the shareholders of ANR on or about December 31, 1981.*

Paragraph F, p. 9 of the Commission's August 10, 1981, Order directed Michigan Consolidated and ANR not to "sell, lease, or otherwise transfer ownership or control" of any of Michigan Consolidated's assets or property rights to ANR or its subsidiaries or to "otherwise proceed with divestiture plans or proposals." On September 8, 1981, ANR, Michigan Consolidated, Storage Company, and Production Company filed a complaint in the Ingham County Circuit Court (No. 81-27947-AA) seeking relief from Paragraph F and other aspects of the Commission's Order. On October 26, 1981, the Ingham County Circuit Court entered a Final Order of

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* The newly-created holding company is referred to in this Settlement Agreement as "NEWCO" because that is how it has been referred to in the Commission proceedings and in related court proceedings. The name of the new holding company is actually Primark Corporation.

Superintending Control and Permanent Injunction. Therein, the [2] Circuit Court declared Paragraph F to be null and void, and permanently enjoined its enforcement, insofar as it applied to divestiture by ANR of the common stock of Michigan Consolidated either (a) by the transfer of the Michigan Consolidated stock directly to ANR's shareholders or, (b) by assignment of Michigan Consolidated stock to NEWCO and subsequent transfer of NEWCO stock to ANR's shareholders.

Two formal pre-hearing conferences and several informal settlement conferences have been held in this case, involving representatives of all parties to this proceeding, and in addition, representatives of ANR, Storage Company and Production Company. The conferences were held in Commission hearing rooms and were open to the public.

On October 29, 1981, and November 2, 1981, Michigan Consolidated furnished to the participants in the settlement conferences a list of all real and personal property conveyances by Michigan Consolidated to its affiliates since January 1, 1976; a list of all material existing agreements between Michigan Consolidated and its affiliates; and a list of all contracts yet to be entered into between Michigan Consolidated and its affiliates as set forth in Appendix A hereto. Michigan Consolidated and ANR have furnished copies of these and other documents as requested by the parties.

The settlement conferences included among other things, discussion of the following transactions between Michigan Consolidated and its affiliates encompassed by the Commission's Order of August 10, 1981:

(1.) (a) A lease dated February 27, 1981, from Michigan Consolidated to Storage Company of certain gas transmission lines extending from Kalkaska, Michigan, to Willow Run, Michigan, together with the Taggart Gas Storage Field and related property and facilities. [3]

(b) An assignment of the same date, from Michigan Consolidated to Storage Company of certain gas storage agreements and transportation agreements which Michigan Consolidated performs using certain of the facilities leased to Storage Company.

(c) An exchange agreement between Michigan Consolidated and Storage Company enabling Storage Company to perform the gas storage agreements assigned by Michigan Consolidated.

(d) A transportation agreement also dated February 27, 1981, wherein ANR agreed to transport gas for Michigan Consolidated through the leased facilities. The lease agreement, the related assignments, the exchange agreement and the transportation agreement were all executed subject to approval of the Federal Energy Regulatory Commission (FERC), sought by joint application in FERC Docket No. CP81-311. The Commission and the State of Michigan intervened in opposition to the application.

(2.) An agreement dated November 5, 1980, by which Michigan Consolidated sold and transferred to Storage Company various storage deeds, storage options, and mineral deeds in northern Michigan, together with Michigan Consolidated's option to purchase, for gas storage purpose, the producer's remaining interest in a number of gas-producing fields when they are 75% depleted.

(3.) A contract dated January 1, 1976, by which Michigan [4] Consolidated sold certain oil and gas leases and related property in Michigan to MNR.

As regards Transactions (1.)(a)-(d), the lease, the assignments, the exchange agreement, and the transportation agreement will, by the terms of this settlement, all be superseded, subject to FERC approval, by a Precedent Agreement

under which Michigan Consolidated would furnish transportation for Storage Company. Thus Michigan Consolidated will continue to own and operate the facilities that would otherwise be leased to Storage Company; will continue to render the storage services that would otherwise be assigned to Storage Company; and will furnish transportation service to Storage Company through the facilities that would otherwise be leased to Storage Company. Additionally, insofar as the facilities to be leased may have a higher potential for future contribution to corporate profits than their present original cost book value would indicate, Michigan Consolidated will retain that potential under the settlement.

As regards Transaction (2.), Michigan Consolidated and Storage Company have agreed, as appears below, to form or cause to be formed a partnership; and Storage Company has agreed, as appears below, to convey or cause to be conveyed to that partnership all interests of every kind which Michigan Consolidated had assigned by the agreement of November 5, 1980. Thus Michigan Consolidated will have the opportunity to participate in gas storage if profitable growth of that activity occurs in Michigan.

As regards Transaction (3.), Production Company has agreed to assign to Michigan Consolidated substantial interests in two producing wells discovered in the leases conveyed. [5]

II.

As a result of the settlement conferences, the parties hereto have reached the agreements stated herein. These agreements are made subject to Commission approval and are intended to settle all controversies between them in this Case No. U-6954, in Ingham Circuit Court No. 81-27947-AA, and in FERC Docket CP81-311; and to permit divestiture of Michigan Consolidated as planned.

NOW THEREFORE, for settlement purposes, the parties hereto stipulate and agree as follows:

1. The lease, the assignments, the exchange agreement, and the transportation agreement, all dated February 27, 1981, and described above as Transactions (1.)(a)-(d) shall be superseded, subject to FERC approval, by the Precedent Agreement (which includes exhibits A, B and C thereto) entered into by Michigan Consolidated and Storage Company on October 29, 1981, copies of which were supplied to the participants in the settlement conferences and are attached hereto as Appendix B.

2.(a). Michigan Consolidated and Storage Company will form a partnership for the development of storage services utilizing these fields wherein the partnership will hold the property interest pursuant to Paragraph 2(c) hereof. The partnership will be formed by subsidiaries of the two companies. The partnership will provide to Michigan Consolidated the opportunity, but not the obligation, to invest up to 25% of the equity required for financing each storage field development project undertaken by the partnership. If either partner declines to invest its full share in a partnership project, the other partner may increase its investment, and thereby its ownership in the partnership accordingly. [6]

The partnership will be managed by a management committee in which both partners will at all times be represented, with voting power in proportion to ownership interest in the partnership. It will designate Storage Company as operator of its facilities.

(b). Storage Company will furnish transportation services for the partnership, between the partnership's storage fields and the interconnection of Storage Company's facilities and Michigan Consolidated's facilities near Kalkaska, Michigan. The partnership, however, will have the right to construct and

own increments to Storage Company's transportation facilities, necessary for the purpose of furnishing transportation facilities, necessary for the purpose of furnishing transportation to the partnership, if Storage Company should be unable or unwilling to do so.

(c). Storage Company will assign and transfer to the partnership, as a contribution to its equity capital, all interest of every kind which Michigan Consolidated conveyed or assigned to Storage Company by the agreement dated November 5, 1980, identified above as Transaction (2.). Those interests will be valued in the partnership at the same price as Storage Company paid Michigan Consolidated for them. Michigan Consolidated will make an initial cash contribution to the partnership. The partnership may distribute cash in an amount such that the initial interests in the partnership will be established at Storage Company 75%, Michigan Consolidated 25%. The partnership will be substituted for Storage Company as a party to the provisions of the agreement dated November 5, 1980, regarding the obligation to reassign the interests acquired from Michigan Consolidated in specified gas fields in northern Michigan or to develop additional storage capacity [7] for Michigan Consolidated's intrastate service; and the obligation to deliver gas to Michigan Consolidated.

3.(a). Michigan Consolidated and Storage Company will make appropriate filings with the FERC, including Docket CP 81-311, so as to proceed in accordance with this Settlement Agreement.

(b). They anticipate at this time that the first such filing will include an application to the FERC to grant a certificate to Storage Company to transport gas for Michigan Wisconsin Pipe Line Company to and from storage to be developed in northern Michigan by Michigan Wisconsin. To enable Storage Company to furnish this transportation, Storage Company and Michigan Consolidated will enter into a transportation agreement pursuant to the Precedent Agreement referred to

in Paragraph 1, above. This FERC proceeding will be the basis for obtaining FERC approval of the Precedent Agreement referred to in Paragraph 1, above, in lieu of the lease agreement proposed in Docket CP81-311.

(c). Subsequently, the new partnership referred to in Paragraph 2(a), above, and Storage Company will apply to the FERC for authority to provide the storage and transportation services described in Paragraph 2(a) and 2(b), above.

4. In both the Rumph-DeGrandchamps #1-2 well and the Parsons #1-2 well, located in Section 2, T4N, R12E, Macomb County, Michigan, Production Company shall assign to Michigan Consolidated an overriding royalty of 1/8 of the working interest attributable to leases conveyed by Michigan Consolidated to MNR, effective at the commencement of production; together with the option to convert said royalty, at [8] payout, to a 2/8 participation in the working interest attributable to leases conveyed by Michigan Consolidated to MNR.

5. The parties to this Settlement Agreement (other than Michigan Consolidated, Storage Company, and ANR) agree they will not, individually or collectively, take any action, judicial, administrative. or otherwise, to prevent, delay, or interfere with ANR's divestiture of Michigan Consolidated as planned; to prevent, delay, or interfere with the FERC approval of activities undertaken in accordance herewith; or to prevent, delay, or interfere with the formation and operation of the partnership provided for in Paragraph 2, above.

6. For this Settlement Agreement to be effective as a settlement of pending cases, it is necessary that the Commission:

a) Issue its final order in this case approving this settlement.

b) Take no further action, judicial, administrative, or otherwise, to prevent, delay, or interfere with ANR's divestiture of Michigan Consolidated as planned; or

to prevent, delay, or interfere with the formation and operation of the partnership as provided herein;

c) Withdraw its protest in FERC Docket No. CP81-311 and take no action to prevent, delay or interfere with the applications described in 3.(b) and (c) above.

7. Upon Commission approval of this Settlement Agreement and issuance of its final order in this case, the Commission and the parties to this Settlement Agreement who are also parties to Ingham Circuit [9] Court case No. 81-27947-AA will submit this Settlement Agreement to that Court and jointly request that it dismiss the case.

8. The parties to this Settlement Agreement join in respectfully requesting the Commission to promptly issue its final order in this case granting approval of this settlement. The Staff certifies that this Settlement Agreement is a reasonable compromise of the existing controversies and is in the public interest.

9. The parties hereto (other than Michigan Consolidated, Storage Company, and ANR) recognize that the ability of ANR to divest Michigan Consolidated as planned constitutes, to those two companies, an essential reason for their willingness to enter into this Settlement Agreement. It is therefore agreed that if on or after December 1, 1981, by reason of pending appeals or otherwise, the Ingham Circuit Court's final order of October 26, 1981, in No. 81-27947-AA, does not provide an adequate basis for the divestiture to proceed as planned, ANR and Michigan Consolidated, in their sole judgment, may by written notice to the parties hereto declare this Settlement Agreement to be null and void.

10. If not approved by the Commission in entirety, this Settlement Agreement shall be null and void.

11.(a). This Settlement Agreement is entered into for compromise and settlement purposes only. No party entering this

Settlement Agreement, nor the Commission by approving it, makes any admission of fact or of law nor is this Settlement Agreement to be precedent for or used with respect to any other proceedings whatever, other than the proceedings specifically referred to herein. [10]

(b). By entering into this Settlement Agreement no party waives any position regarding divestiture-related transactions between Michigan Consolidated and affiliates in the ANR System which that party may assert in future Michigan Consolidated rate cases before the Commission or otherwise.

Done in Lansing, Michigan, this 12th day of November, 1981

MICHIGAN PUBLIC SERVICE COMMISSION STAFF

By /s/ _____

AMERICAN NATURAL RESOURCES COMPANY

By /s/ _____

MICHIGAN CONSOLIDATED GAS COMPANY

By /s/ _____

ANR STORAGE COMPANY

By /s/ _____

ANR PRODUCTION COMPANY

By /s/ _____

ATTORNEY GENERAL FRANK J. KELLEY

By /s/

WISCONSIN DISTRIBUTION GROUP

By /s/

ABATE

By /s/

[11]

The Commission finds:

(1) *The Jackson Prairie underground gas storage project in Lewis County, Washington, has been and now is a facility used in the transportation of natural gas subject to the jurisdiction of the Commission, and its operator is engaged in the transportation of natural gas in interstate commerce within the meaning of Section 2(6) of the Natural Gas Act and is subject to the requirements of Sections 7(c) and (e) thereof.*

(2) Under the "arrangements for the permanent operation and future development of the Storage Project" embodied in the Gas Storage Project Agreement dated June 25, 1970, among El Paso Natural Gas Company, Washington Natural Gas company and The Washington Water Power Company, a "corporation" within the meaning of Section 2(2) of the Natural Gas Act is operating the Storage Project through Washington Natural Gas Company as Project Operator and is, therefore, a "natural-gas company" within the meaning of Section 9(6) and subject to the requirements of Section 7 thereof, among other applicable provisions.

(3) Washington Natural Gas Company, other than as Project Operator, as aforesaid, and The Washington Water Power Compar are not engaged in jurisdictional transportation or sales and are not, therefore, "natural-gas companies" within the meaning of Section 2(6) of the Natural Gas Act, and their local distribution activities and facilities are exempted from the provisions thereof by Section 1(b).

The Commission orders:

(A) Finding (1) of the Commission's order issued September 25, 1970 (44 FPC 1055) and Finding (2) of the Commission's order issued February 23, 1971 (45 FPC 332) are vacated insofar as they state, respectively, that Washington Natural Gas Company "will be a 'natural-gas company'

within the meaning of the Natural Gas Act" and "is the permanent operator" of the Storage Project.

(B) The certificate of public convenience and necessity in Docket No. CP64-99 is modified, as appropriate, to be consistent herewith, and the certificates of public convenience and necessity in Docket Nos. CP71-6 and CP71-7 are modified to provide that no person other than the constituent members of the "corporation" within the meaning of Section 2(2) of the Natural Gas Act which is operating the Storage Project shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public con- [1534]

STATE OF MICHIGAN
JAMES J. BLANCHARD, Governor
DEPARTMENT OF COMMERCE
Doug Ross, Director

COMMISSIONERS
William E. Long
Edwyna G. Anderson
Matthew E. McLogan

PUBLIC SERVICE COMMISSION
6545 Mercantile Way
P.O. Box 30221
Lansing, Michigan 48909

(Handwritten notation) Messrs. Happer, Harrison, McAllister, Regan, Iribe. FYI and future reference as necessary. G. Martin 10/25

October 24, 1985

Mr. Gerald E. Martin, Director-Accounting
ANR Pipeline Company
500 Renaissance Center
Detroit, MI 48243

Dear Mr. Martin:

In recent months there has been some confusion as to the securities issuance approval procedure and the time required by the Commission to process such applications. This letter is intended to explain this matter.

The authority of this Commission derives from PA 144 of 1909 which obligates all Michigan utilities (other than municipals) to seek Commission approval prior to issuance of securities and evidence of indebtedness. Rules 65 and 66 of the Commission's Rules of Practice and Procedure have been established as the minimum requirements of a securities application filing. While the Securities Act does not require that hearings be held, the Commission has discretion to make an inquiry or investigation, hold hearings and examine witnesses, books, papers, documents, or contracts the Commission considers of importance to satisfy itself that the securities to be issued are reasonable, lawful and in the public interest.

In order to ensure timely processing of security applications and to avoid undue burden on the Staff, the Commission, and the Applicant, the Commission does not routinely insist on hearings. However, the current standard is for the Applicant to publish a Notice of Opportunity for Comments and Inquiry, to give the parties an opportunity to be heard.

The Staff, upon its review and analysis, could recommend ex parte treatment if no responses are received from the published Notice. The Commission may, in some cases, not accept the Staff recommendation and order hearings on the matter. The Staff, after its review, may also conclude that hearings are desirable if the proposed securities would result in a large rate increase, an imbalanced capital structure, unreasonable terms and conditions, or an undesirable risk.

When a contested hearing must be held, no specific time frame can be guaranteed, although current standard is that it should be completed within six months. [-1-]

In cases where no hearings are held, sufficient time must still be allowed for staff review, Notice of Opportunity, preparation of draft order, and adequate time for Commission review. Presently, our standard is that this procedure takes three months. Exceptional cases which may be handled on an expedited basis must still require a minimum of six weeks from the date of filing as indicated below:

Week 1: Initial review and issue Notice of Opportunity.
Week 2-3: Evaluate filing and allow 2 weeks for Notice.
Week 4: Prepare draft order and tentatively place on the agenda.
Week 5-6 Commission review, and issue order.

We at the Commission recognize the importance of timely Commission consideration. However, many a time in the past the Commission and the Staff have been boxed in by a utility agreeing to an unrealistic commitment period to a bank or a financial institution. In other cases the utility has waited too long before filing the securities application. In the future such situations will not be accommodated.

It is my suggestion, therefore, that you instruct your responsible personnel to plan their security issuance programs bearing in mind the regulatory requirements and allowing sufficient time for this process. It is our sincere desire to facilitate your planning and timing of the securities issuance program. The adverse consequences flowing from insufficient time provision must be borne by the utility.

If you have any questions or comments, please contact me.

Sincerely,

/s/ HASSO C. BHATIA, PH.D

Hasso C. Bhatia, Ph.D
Director
Technical Services Division

[-2-]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[CAPTION]

AFFIDAVIT OF HASSO BHATIA

Being first duly sworn, affiant hereby deposes and says as follows:

1. He is Hasso Bhatia, Director, Technical Services Division, Michigan Public Service Commission (MPSC).

2. He is the author of the attached letter and was involved in ANR Pipeline Company's (ANR) most recent securities order in Case No. U-8276.

3. The letter discusses procedures and time periods believed by the MPSC Staff to be routinely necessary for Staff's review of a securities application. By and large, these are guidelines that have been used by Staff for years. [-1-]

4. In appropriate cases, the MPSC has often issued securities approvals in shorter periods of time than those in the letter, requiring Staff to depart from these guidelines. Even now, the guidelines themselves provide for processing exceptional cases in six weeks time.

5. The level and depth of Staff's investigation of a securities application is directly proportional to the degree of regulation exercised by the MPSC over the applying utility. The MPSC's regulatory authority over ANR Pipeline Company (ANR) is minimal, so Staff's investigation of ANR's application need not be exhaustive, as it must routinely be with heavily regulated utilities.

6. Staff's investigation of ANR's securities application in U-8276 consisted, in part, of a determination that the securities were not in violation of agreements reached in connection with the divestiture of Michigan Consolidated Gas

Company by American Natural Resources Company, ANR's parent.

7. The attached letter was written to *all* state regulated utilities in the spirit of cooperation and was designed 1) to solicit their consideration for Staff and Commission resources whenever possible, and 2) to facilitate, not obstruct, securities issuances. [-2-]

8. The procedures in the letter are designed to provide the flexibility necessary for adequate review of securities applications by all utilities and are not applicable only to ANR.

/s/ HASSO BHATIA

Hasso Bhatia

Subscribed and sworn to before me
this ____ day of November, 1985

/s/ JUDITH BRADMAN

Judith Bradman, Notary Public
Clinton Acting in Ingham Cty MI
My Commission Expires 09-17-86

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[CAPTION]

AFFIDAVIT OF ROBERT NELSON

Being first duly sworn, affiant hereby deposes and says as follows:

1. He is Robert Nelson, Director, Office of Regulatory and Consumer Affairs, Michigan Public Service Commission (MPSC).

2. He was involved in the processing and drafting of ANR Pipeline Company's (ANR) most recent securities order in Case No. U-8276 (attached). The application for approval in that case was filed September 20, 1985.

3. The MPSC gave that application expedited consideration, because of the claimed short time frame available.

4. The only existing procedure of the MPSC governing the time necessary for considering securities applications is [-1-] that the orders be issued in a timely fashion, considering the circumstances of the case and any special considerations claimed by the Applicant.

5. The attached order in Case No. U-8276 is an example of the special consideration available to an applicant for securities approval in Michigan. In its application, ANR requested approval in less than 16 days. The Commission's order was issued on October 1, 1985, ten days after the application was received.

/s/ ROBERT NELSON

Robert Nelson

Subscribed and sworn to before me
this 8th day of November, 1985

/s/

Notary Public, Eaton County, Michigan
acting in Ingham County
My Commission Expires April 6, 1987.

[-2-]

STATE OF MICHIGAN
BEFORE THE MICHIGAN
PUBLIC SERVICE COMMISSION

• • • • •

In the matter of the application of
ANR PIPELINE COMPANY for authority
to issue securities.

Case No.
U-8276

At a session of the Michigan Public Service Commission held at its offices in the city of Lansing, Michigan on the 1st day of October, 1985.

PRESENT: Hon. Peter S. Walters, Chairperson
Hon. Edwyna G. Anderson, Commissioner
Hon. Matthew E. McLogan, Commissioner

SECURITIES

On September 20, 1985, ANR Pipeline Company (ANR Pipeline), formerly Michigan Wisconsin Pipe Line Company, filed an application requesting authority to issue and sell up to 125,000,000 Swiss Francs (Swf) of Swiss Franc Bonds (New Bonds).

ANR Pipeline is a corporation organized under the laws of the state of Delaware and is qualified to do business in the State of Michigan as a foreign corporation. ANR Pipeline is engaged primarily in the purchase, transmission, storage and sale of natural gas in interstate commerce. Its principal Michigan office is located at 500 Renaissance Center, Detroit.

ANR Pipeline owns and operates an extensive interstate natural gas transmission system extending from the Anadarko Basin in Oklahoma and Texas and the onshore Louisiana and offshore Louisiana and Texas natural gas fields to its [-1-] markets in the midwestern United States. Less than nine percent

of ANR Pipeline's approximately 11,340 miles of pipeline is located within the state of Michigan. As of December 31, 1984, Michigan plant investment equaled $617,392,000.

ANR Pipeline sells all of its gas at a wholesale rate to gas distribution customers serving markets in the states of Michigan, Wisconsin, Iowa, Illinois, Kansas, Missouri, Ohio and Tennessee. It does not sell or distribute natural gas at a retail rate. ANR Pipeline also provides interstate natural gas storage service and interstate transportation of natural gas for other gas transmission and distribution systems in the states of Illinois, Indiana, Iowa, Louisiana, Michigan, Mississippi, Ohio, Texas and Wisconsin and in the federal and state waters of the Gulf of Mexico offshore Louisiana.

ANR Pipeline proposes to issue and sell in Switzerland during October, 1985, at such time it deems appropriate, in public transactions, on a negotiated basis up to a maximum principal amount of 125,000,000 SwF of New Bonds to mature not later than the year 1995 in denominations of SwF 5,000 and 10,000. The issuance and sale of the New Bonds will produce net proceeds of approximately $50,000,000.

ANR Pipeline and the prospective initial purchasers of the New Bonds have not yet entered into a definitive purchase agreement.

ANR Pipeline represents that the net proceeds from the issuance and sale of securities for which authorization is sought are intended to be used for the [2] discharge or lawful refunding of obligations that occurred and will occur in 1985 and for other lawful corporate purposes.

A certified copy of the action by the ANR Pipeline board of directors approving the plans of issuance of the proposed securities was attached to the application.

The Commission is satisfied that the funds to be acquired by ANR Pipeline from the issuance of securities are reasonably required for the lawful corporate purposes of ANR Pipeline and the issuance is necessary to the successful carrying out and accomplishment of ANR Pipeline's lawful corporate purposes.

After a review of the application, the Commission finds that ex parte approval is appropriate. The proposal is just, reasonable and in the public interest.

The Commission FINDS that:

a. Jurisdiction is pursuant to Act 144 of the Public Acts of 1909, as amended, being MCLA 460.301 et seq.; and the Commission's Rules of Practice and Procedure, 1979 Administrative Code, R 460.11 et seq.

b. The Commission is satisfied that the funds to be acquired by ANR Pipeline from the issuance of securities are reasonably required for the lawful corporate purposes of ANR Pipeline and the issuance is necessary to the successful carrying out and accomplishment of ANR Pipeline's lawful corporate purposes. [3]

c. Ex parte approval is appropriate.

THEREFORE, IT IS ORDERED that:

A. ANR Pipeline Company is authorized to issue and sell in October, 1985, at such time as ANR Pipeline Company deems appropriate, in public transactions, on a negotiated basis, up to a maximum principal amount of 125,000,000 Swiss Francs of Swiss Franc Bonds to mature not later than the year 1995.

B. ANR Pipeline Company shall file with this Commission a copy of any agreement made in regard to the issuance authorized herein showing the terms and conditions as finally executed and delivered.

The Commission specifically reserves jurisdiction of the matters herein contained and the authority to issue such further order or orders as the facts and circumstances may require. [4]

Any party desiring to appeal this order must perfect an appeal to the Michigan Court of Appeals within 21 days after issuance and notice of this order, pursuant to MCR 7.205.

MICHIGAN PUBLIC
SERVICE COMMISSION

I abstain.

/s/ PETER S. WALTERS

Chairperson

/s/ EDWYNA G. ANDERSON

Commissioner

(SEAL)

/s/ MATTHEW E. MCLOGAN

Commissioner

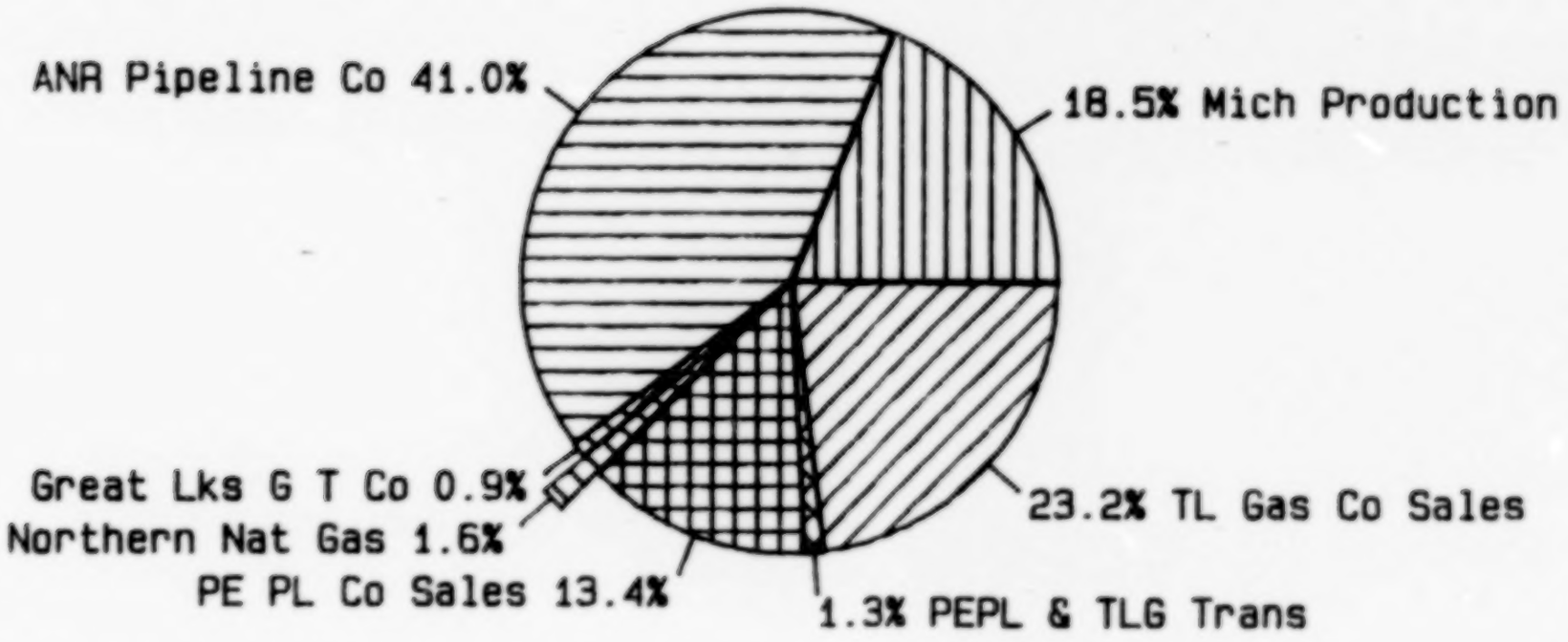
By the Commission and pursuant to
its action of October 1, 1985.

/s/ BRUCE R. MAUGHAN

Its Secretary

MICHIGAN NATURAL GAS

1984 SOURCES BY SUPPLIER (% by Volume)

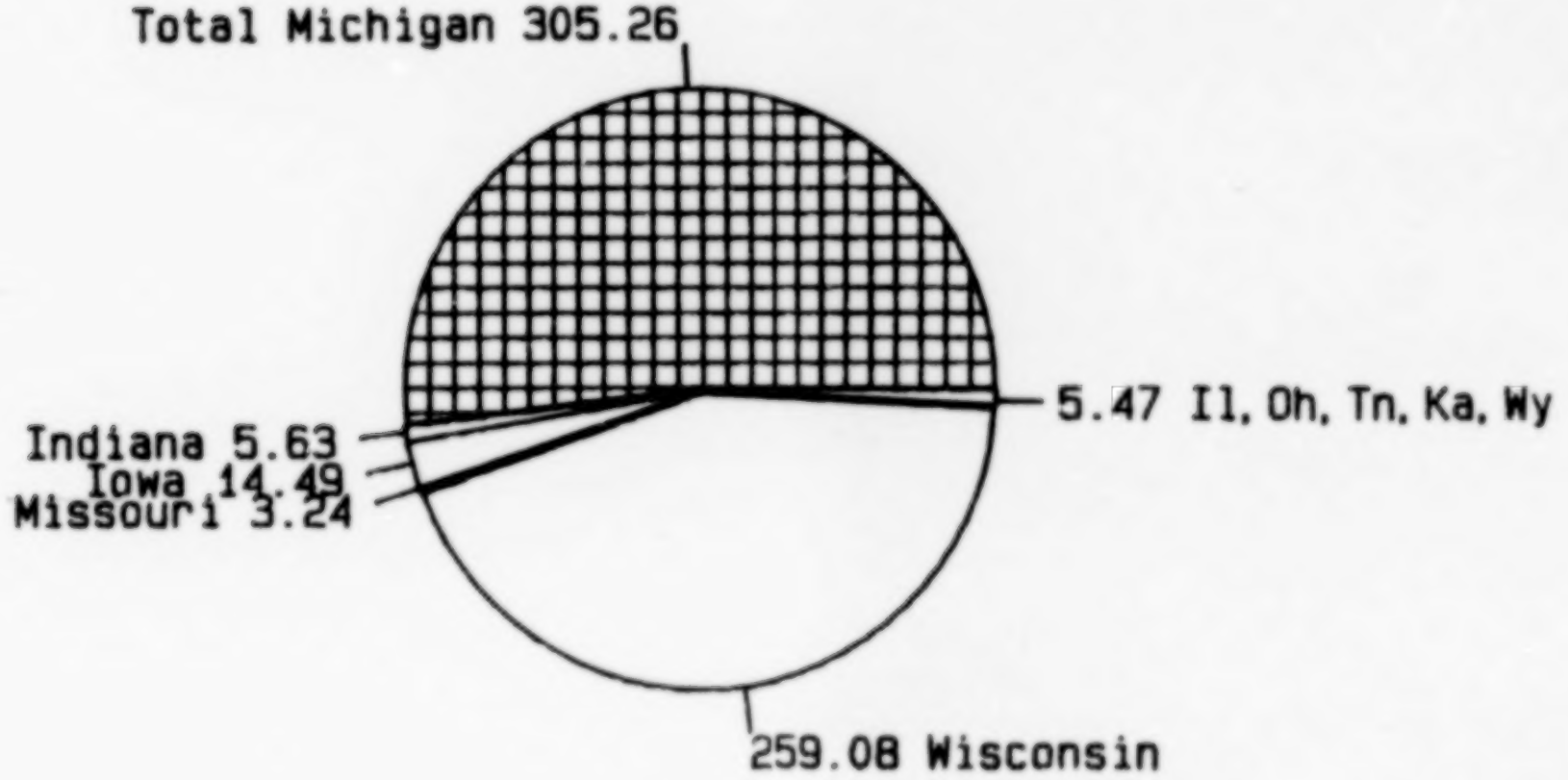


1984 Total Supply = 743.8 Bcf

8/85 FPTA, GAS DIV, MPSC

ANR Pipeline Company

1984 Sales – Bcf @ 14.73 PSIA Dry



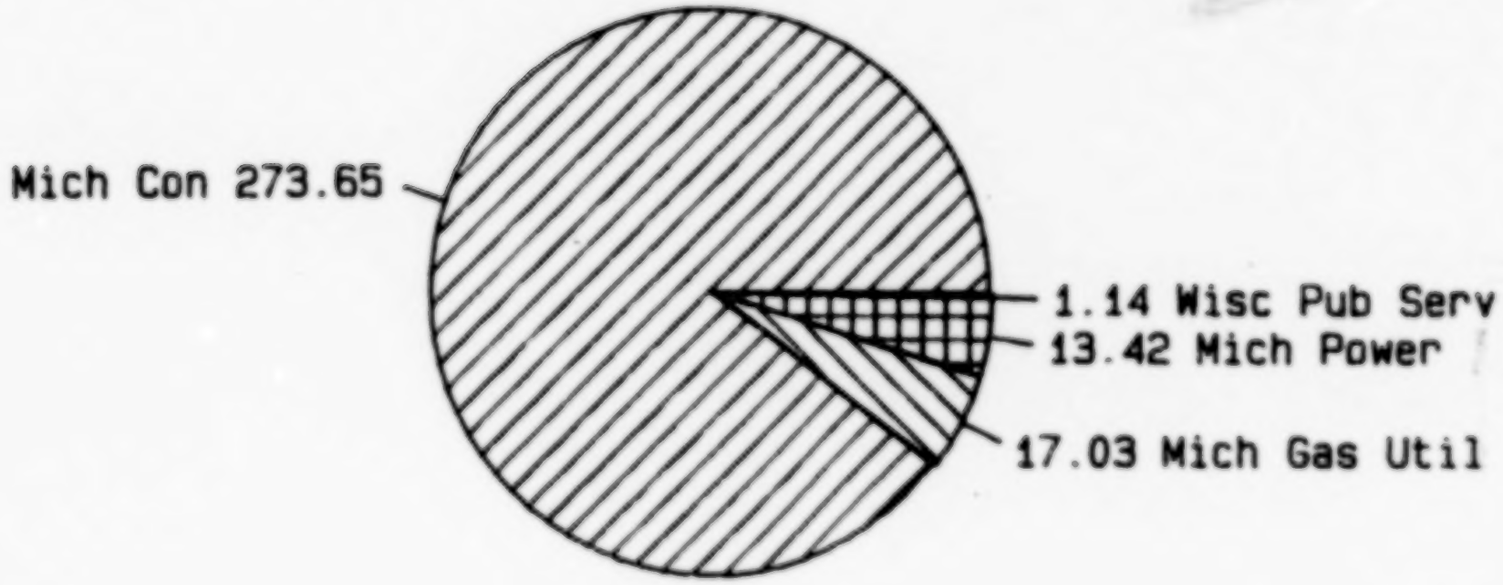
TOTAL SALES = 593.19 Bcf

6/85 FPTA, GAS DIV, MPSC

ANR Pipeline Company

1984 Sales — Bcf @ 14.73 PSIA Dry

Michigan Only



TOTAL SALES - 305.26 Bcf

8/85 FPTA, GAS DIV, MPSC

PETITIONER'S

BRIEF

No. 86-986

Supreme Court, U.S.
FILED
MAY 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

October Term, 1986

MICHIGAN PUBLIC SERVICE COMMISSIONERS
Eric J. SCHNEIDEWIND, Edwyna G. ANDERSON
and Matthew E. MC LOGAN,
Petitioners,

v

ANR PIPELINE COMPANY and ANR STORAGE COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

I

WHETHER A STATE STATUTE, 1909 P.A. 144, MICH. COMP. LAWS 460.301 *ET SEQ.*; MICH. STAT. ANN. 22.101 *ET SEQ.*, REGULATING THE SECURITIES OF UTILITIES, INCLUDING NATURAL GAS COMPANIES HAVING MAJOR OPERATIONS IN MICHIGAN, IS PREEMPTED BY THE NATURAL GAS ACT, 15 U.S.C. § 717 *ET SEQ.*

II

WHETHER THE MICHIGAN PUBLIC UTILITIES SECURITIES STATUTE, 1909 P.A. 144, MICH. COMP. LAWS 460.301 *ET SEQ.*; MICH. STAT. ANN. 22.101 *ET SEQ.*, VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION ON THE BASIS THAT IT IMPERMISSIBLY BURDENS INTERSTATE COMMERCE.

LIST OF PARTIES

The parties before the United States Court of Appeals for the Sixth Circuit were:

ANR Pipeline Company and ANR Storage Company, plaintiff/appellants.

Michigan Public Service Commissioners (former Michigan Public Service Commission Chairman Eric J. Schneidewind, and Commissioners Edwyna G. Anderson and Matthew E. McLogan in their official capacities), defendant/appellees.

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No. 86-986

In The Supreme Court of the United States

October Term, 1986

MICHIGAN PUBLIC SERVICE COMMISSIONERS
Eric J. SCHNEIDEWIND, Edwyna G. ANDERSON
and Matthew E. MC LOGAN,
Petitioners,

v

ANR PIPELINE COMPANY and ANR STORAGE COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONERS

OPINIONS AND ORDERS BELOW

The Court of Appeals' opinion is reported at 801 F.2d 228 (6th Cir. 1986) and is reprinted in the *Certiorari* Petition Appendix ("C.P.A.") A-1 to A-21.

The District Court opinion and order are reported at 627 F. Supp. 923 (W.D. Mich. 1985) and is reprinted at C.P.A. B-1 to B-24. A prior District Court opinion and order granting in part and denying in part Petitioners' motion to dismiss is reported at 608 F. Supp. 43 (W.D. Mich. 1984).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Petition for a Writ of *Certiorari* was filed on December 12, 1986, and was granted on February 23, 1987.

STATUTORY PROVISIONS INVOLVED

A. Michigan Utilities Securities Act ("Act 144"), 1909 P.A. 144, Mich. Comp. Laws ("M.C.L.") 460.301 et seq.

Act 144 governs the issuances of securities by regulated public utilities and natural gas companies, which includes Respondents ANR Pipeline Company ("Pipeline") and ANR Storage Company ("Storage"). Act 144 defines the nature of the MPSC's limited review and provides that companies regulated under the Act may issue securities only if the Michigan Public Service Commission ("MPSC") has authorized the issuance and the amount. M.C.L. 460.301(1). See relevant provisions; C.P.A. C-1 to C-5. The Act requires the MPSC to approve a securities issuance if it is "to be applied to lawful purposes . . . is essential to the successful carrying out of the purposes, or . . . the issue . . . represents accumulated and undistributed earnings invested in capital assets and not previously capitalized." M.C.L. 460.301(3).

B. Natural Gas Act ("NGA"), 15 U.S.C. § 717 et seq.

The NGA regulates the transportation of natural gas in interstate commerce, the sale in interstate commerce of natural gas for resale, and natural gas companies engaged in such transactions. 15 U.S.C. § 717(b).

Section 7 of the NGA provides that a natural gas company may not "undertake the construction or extension of any facilities" unless the Federal Energy Regulatory Commission ("FERC") issues a certificate of public convenience and necessity. 15 U.S.C. § 717f(c). Section 7 further authorizes FERC to attach to the certificate "such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e).

18 C.F.R. § 157.14(a)(14), promulgated in 1952 by the Federal Power Commission,[1] FERC's predecessor, provides that a natural gas company application for a § 7 certificate must contain an exhibit detailing the financing of the project.

C. Relevant Federal Statutes

Other federal statutes establish dual federal and state regulation of securities, or delegate such regulation to the states, as follows: Federal Power Act ("FPA"), 16 U.S.C. § 791 *et seq.*; Public Utility Holding Company Act ("PUHCA"), 15 U.S.C. § 79 *et seq.*; Securities Act of 1933 ("SA of 1933"), 15 U.S.C. § 77a *et seq.*; Securities Exchange Act of 1934 ("SEA of 1934"), 15 U.S.C. § 78 *et seq* (C.P.A. D-1 to D-10).

STATEMENT OF CASE

A. Preliminary Statement

Respondents assert a facial challenge to the MPSC's authority to review their securities pursuant to Act 144. They contend Act 144 is preempted by the NGA and, further, that Act 144 constitutes an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3. Respondents commenced this action at a time when they had no securities applications pending before the MPSC and despite a long history of expeditious MPSC review of Respondents' securities issuances.

On August 22, 1985, the District Court ruled that Act 144 was neither preempted by federal statutes nor did it constitute an undue burden on interstate commerce. The District Court thus affirmed the MPSC's authority to conduct preissuance review of Respondents' securities.

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[1] The Federal Power Commission and Federal Energy Regulatory Commission are hereafter referenced as "FERC."

Respondents appealed the District Court's ruling to the Court of Appeals which, on September 15, 1986, issued an opinion reversing the District Court on both claims, finding specifically that Act 144 was preempted by federal statute and constituted an impermissible burden on interstate commerce.

B. Background Facts

1. American Natural Resources Company and Michigan Consolidated Gas Company.

Pipeline and Storage are owned by American Natural Resources Company ("ANR"), a diversified holding company with principal offices in Detroit, Michigan (Joint Appendix ["J.A."] 59). ANR was previously the parent company of another wholly owned subsidiary, Michigan Consolidated Gas Company ("MCGC"), a major gas distribution utility providing service to over one million Michigan customers, until ANR divested MCGC effective December 31, 1981 (J.A. 59, 134). The MPSC initiated an inquiry into the planned divestiture when its staff learned that ANR would be requiring its subsidiary, MCGC, to transfer some of MCGC's important assets and business rights (including gas storage and transmission line facilities and operations) to ANR. The MPSC's concern was that these affiliated transactions, not undertaken at arm's-length, would diminish MCGC's ability to provide adequate, reliable, safe and reasonably priced gas service to its Michigan service territory.[2] The MPSC's inquiry was conducted pursuant to its jurisdiction under Act 144, among other Michigan statutes (J.A. 59-60, 123, 129). The MPSC proceedings were ultimately settled in a manner which permitted MCGC to retain facilities and assets which the MPSC concluded were necessary for

[2] The MPSC's informal and formal inquiries into the divestiture, MPSC cases U-6790 and U-6954 respectively, were commenced on March 5, 1981, and August 10, 1981, respectively (J.A. 59-60, 118-133).

MCGC to provide adequate, reliable, safe and reasonably priced gas service to its customers.[3]

Although MCGC is now divested from the ANR system, critical business relationships between MCGC and ANR or its affiliates remain. Pipeline is MCGC's primary gas supplier, and numerous gas purchase contracts between Pipeline and MCGC are in force (J.A. 64-65, 87-88, 98-100, 193). Pipeline also leases eight underground storage fields and associated facilities from MCGC in Michigan, including many miles of field and storage pipelines (J.A. 62-63, 90). MCGC also owns transmission lines or other facilities which would be used by Pipeline.[4]

2. Pipeline Company

Pipeline, known as Michigan-Wisconsin Pipeline Company until January 1, 1984, is a Delaware corporation incorporated in 1945 and qualified to do business in Michigan (J.A. 85). Its principal offices and headquarters are in Detroit, Michigan (J.A. 7, 59). Pipeline owns and operates an interstate natural gas pipeline system which transports and

[3] The MPSC orders commencing the divestiture inquiries are at J.A. 118-122 and J.A. 123-132. The modifications of ANR's unilateral pre-divestiture agreements are reflected in the settlement agreement in U-6954 (J.A. 169-179), the attached precedent agreement (J.A. 157-168), and MPSC approval order (J.A. 133-142). The MPSC's Act 144 reviews of Pipeline's securities provides an opportunity for the MPSC to assure that Pipeline's securities transactions do not violate the divestiture settlements (J.A. 184-185).

[4] MCGC's Kalkaska-Wolfolk pipeline extends from Pipeline's transmission line on the south to a point near Storage's facilities on the north, and could be used to transport gas from Storage to Pipeline. The same MCGC pipeline connects pipeline transmission lines on the east and west sides of the state and can be used to transport storage gas south and east for Pipeline (Michigan area map, J.A. 115-116). Further, as part of the divestiture settlement, a subsidiary of Storage and a subsidiary of MCGC planned to form a partnership to develop underground storage in Michigan (J.A. 174-176).

sells natural gas, for resale only, to 51 gas distribution customers in nine states (J.A. 61). Pipeline transports natural gas from producers in Texas, Louisiana and nearby states, and also Wyoming, by large cross-country pipelines primarily to the states of Michigan and Wisconsin (J.A. 61-62, 64, 86).

Pipeline, a predominant natural gas supplier to Michigan, sells more natural gas in Michigan than in any other state. In 1983, over 50% of Pipeline's sales were in Michigan, approximately 45% in Wisconsin, and less than 5% in other states (J.A. 65). In 1984, Pipeline's sales were comparable, with 305.26 Bcf (51%) of Pipeline's sales in Michigan, 259.08 Bcf in Wisconsin (44%), and 28.83 Bcf (5%) in all other states (J.A. 192). In 1984, Michigan received 41% of its total natural gas supplies from Pipeline (J.A. 191). MCGC, a major Michigan gas distribution utility, is heavily dependent upon Pipeline for gas supplies and certain natural gas transportation services (J.A. 64-65).

Pipeline owns and operates 773 miles of gas transmission pipeline and associated equipment located in Michigan, which includes two multiple, large-diameter pipelines entering Michigan from Indiana, one pipeline entering Michigan from Ohio, and two transmission lines extending between Wisconsin and Michigan in Upper Michigan, that together provide service to four different Michigan gas distribution utilities including MCGC (J.A. 62-63). Pipeline also owns and operates 195 miles of field and storage pipelines, two transmission compressor stations and ten underground storage compressor stations in Michigan[5] (J.A. 63). Pipeline at year-end 1983 had more net plant investment in Michigan ($309.5 million) than any other single state (federal waters, $241.5 million; Louisiana, $160.8 million) (J.A. 113).

[5] Outside the state of Michigan, Pipeline owns and operates 6,947 miles of gas transmission pipeline and associated equipment, 3,507 miles of gathering lines, 35 transmission compressor stations and 54 field compressor stations (J.A. 64).

All of Pipeline-operated gas storage fields, comprising 15 storage fields having a total storage capacity of 28.7 Bcf, are located in Michigan, of which eight fields are owned by MCGC and leased to Pipeline (J.A. 62, 65, 86, 89-90, 93). Some of these storage fields are connected to Pipeline by lines leased from MCGC, while others are connected by lines owned by Pipeline (J.A. 63). Pipeline supplies the peak winter requirements of its Michigan and Wisconsin customers from its Michigan-operated storage fields, which have been developed in part by invoking the certification authority of the MPSC, and by utilizing condemnation proceedings in Michigan courts[6] (J.A. 65-67).

Pipeline's transmission lines, storage facilities, and operations also impact Michigan, its courts, governmental agencies, and citizens in several ways. Pipeline must obtain authorization from appropriate authorities or property owners with respect to pipeline crossings over rivers, public lands, highways, railroad rights-of-way, among other requirements (J.A. 65-67, 93-94). Further, eminent domain proceedings may be initiated in either federal or state courts to obtain necessary rights-of-way to construct, operate and maintain necessary pipelines and associated facilities (J.A. 65-67, 93-94). Pipeline, due to its extensive facilities and operations in Michigan, obtains numerous benefits from state and local governments, including but not limited to access to courts, the MPSC, local property recordation services, police and fire protection.

[6] Pipeline and Storage have the right under Michigan statutes to invoke the jurisdiction of the MPSC and state courts to condemn private property for corporate purposes, pursuant to the procedures in the Michigan Power Company Condemnation Act, M.C.L. 486.251 *et seq.*, and the Uniform Condemnation Procedure Act, M.C.L. 213.51 *et seq* [see §6(3), MCL 213.56(3)]. Importantly, § 2 of the Power Company Condemnation Act, M.C.L. 486.252, requires a company to obtain a certificate of public convenience and necessity from the MPSC prior to initiating condemnation proceedings for acquiring property to develop a natural gas storage field. Pipeline has utilized this procedure in the past (J.A. 66-67).

The MPSC, pursuant to Act 144, has regulated securities issued by Pipeline since its incorporation in 1945, except for the period of 1970-1979.[7] Since 1979, Pipeline has received unconditional approval of all seven of its securities issue applications. Six applications gained approval within three to six weeks, however, the remaining application took eight months to secure approval largely due to the fact that Pipeline temporarily withdrew its application (J.A. 39-40, 67-68). Following commencement of this case, the MPSC reviewed and approved two securities applications by Pipeline, issuing orders within 10-25 days of Pipeline's application (J.A. 186). Overall, Pipeline's needs for long-term financing are moderate and occasional.[8]

3. Storage Company

Storage Company, an ANR-owned affiliate separate from Pipeline, is a Michigan corporation that develops, owns and operates gas storage reservoirs to store gas for nonaffiliated customers (J.A. 7, 59, 70, 73-74, 82-83). All of Storage's operations are conducted in Michigan (J.A. 71-73, 82-83, 112). The headquarters, facilities, operations and investment, comprising a year-end 1983 total value of at least $120 million, are all located in Michigan (J.A. 59, 71, 111). Storage's facilities include the ownership and operation of four storage fields, three compressor stations and associated facilities, and

[7] During the 1970s, the MPSC concluded that such securities issuances were not subject to MPSC consideration under Act 144, because of the Michigan Court of Appeals decision in *Great Lakes Transmission Co.* v. *MPSC*, 24 Mich. App. 77; 180 N.W.2d 59 (1970). However, following the Michigan Supreme Court decision in *Michigan Gas Storage Co.* v. *MPSC*, 405 Mich. 376; 275 N.W.2d 457 (1979), securities issuance applications were again filed with the MPSC under Act 144.

[8] When this case commenced Pipeline projected that it might issue $50 million in securities, not including refunding of debts, in 1986 and approximately $100 million in 1987 (J.A. 35). Pipeline's FERC Form 2 Report (J.A. 107), however, indicates only miscellaneous minor construction-work-in-progress by Pipeline for the year ending December, 1983, equaling less than $18 million among some 11 listed projects, several of which were too minimal to require certification by FERC. (See also J.A. 69-70, 76, 94-97, 107, 111).

24 miles of underground storage lines, the latter of which connect its storage fields to Great Lakes Transmission Company ("Great Lakes"), another interstate pipeline which crosses Michigan (J.A. 71-73). Storage has 53 Bcf of working storage capacity, and plans to develop 15.7 Bcf more storage capacity in Michigan (J.A. 45-46). Its capital requirements appear modest, as FERC Form 2 (J.A. 111) indicates a construction-work-in-progress balance of approximately $4.1 million at the beginning of 1983, and of $1.7 million at the end of 1983.

Storage receives gas for storage from its out-of-state unaffiliated customers through its interconnection with Great Lakes in Michigan, and redelivers it to Great Lakes at the same interconnection. Delivery of gas to the ultimate customer is thus accomplished by displacement, a commonly employed practice among pipeline companies of exchanging equivalent volumes of gas at a mutually convenient place in lieu of actual physical delivery of the stored gas (J.A. 54-56, 71-73).

Storage neither engages in the interstate transportation or sale of gas, nor has any FERC-approved transportation tariffs.[9] Furthermore, Storage has no contacts with any other state except Michigan. All of its facilities, operations and investment are located entirely within Michigan, all of its services are provided in Michigan, and it obtains all of its revenues in the state.[10] Storage's only interstate characteristic is that it offers its services to out-of-state unaffiliated customers, although such services could also be performed for in-state customers.

[9] Respondents admit that Storage does not sell gas (J.A. 54-56), only transports gas through its associated underground storage lines to an interconnection with Great Lakes located in Michigan (J.A. 54, 56-57, 73), does not transport natural gas across state borders (J.A. 40, 54, 56), does not own natural gas transportation facilities that cross state boundaries (J.A. 54, 56), and has no interstate transportation tariffs (J.A. 54, 56-57, 73).

[10] Like Pipeline, Storage has numerous other contacts with Michigan, its government and its citizens due to the development, operation and maintenance of its storage facilities and associated lines and compressor stations in Michigan.

Storage has no physical or other connection with Pipeline's function of transporting or selling natural gas, nor does it store gas for Pipeline (J.A. 30, 33). Storage is therefore "not an integral and essential part of Pipeline Company's system operations" (J.A. 30-34, 52, 73), nor do Storage's facilities or operations have any relationship to the facilities and operations of Pipeline.[11]

The MPSC has exercised authority over Storage's securities continuously since 1979, during which time Storage received unconditional approval of all three applications it submitted, each within three to six weeks. The MPSC's review, however, was interrupted in one case by Storage's own action in withrawing its application, which was later resubmitted and approved (J.A. 40, 75).

SUMMARY OF ARGUMENT

A. Act 144 is not implicitly preempted by the NGA or any other federal law. No federal statute expressly states that FERC has the authority to regulate the issuance of securities by natural gas companies. Congressional intent, as evidenced by the legislative history of the NGA and the general federal statutory scheme concerning both natural gas and securities regulation has been to complement and strengthen state utility and securities regulation. Congress has carefully preserved the ability of the states to regulate natural gas company securities issuances. Despite repeated attempts by FERC to have the NGA amended to provide it with securities jurisdiction, Congress has consistently rejected such efforts.

B. NGA § 7(c) and 7(e) and its implementing regulation, 18 C.F.R. § 157.14(a)(14), does not contain implicit authority for FERC to regulate natural gas company securities or

[11] Storage neither provides, nor was it formed to provide, storage service to or for Pipeline, since Pipeline has its own system storage (J.A. 30-34). Further, there exists no relationship between Storage's and Pipeline's activities, facilities, operations, decisions or customers (J.A. 30-34, 43-44, 47-48, 73-74).

preempt state securities regulation. The purpose of § 7(c) and § 7(e), as amended in pertinent part in 1942, was solely to provide FERC with the power to regulate and prevent the uneconomic or unregulated construction of facilities or extensions to the interstate natural gas pipeline system. If 18 C.F.R. § 157.14(a)(14) is determined to be of a preemptive nature, it is void because it is beyond the scope of authority delegated to FERC by Congress. *Cf. Louisiana Public Service Comm.* v. *Federal Communications Comm.*, 476 U.S. ____; 90 L. Ed. 2d 369 (1986). Further, even if 18 C.F.R. § 157.14(a)(14) is determined to be within FERC's delegated authority, it is nonetheless void because it fails to declare any intention that it is preemptive of state law. *California Coastal Comm., et al.* v. *Granite Rock Co.*, ____ U.S. ____; 55 U.S.L.W. 4366, 4369 (March 24, 1987), *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 718 (1985). Act 144 also is not implicitly preempted by the Supremacy Clause as a conflict with federal regulation, since Act 144 promotes rather than conflicts with the accomplishment and execution of the full purposes and objectives of Congress.

C. Act 144 does not constitute an impermissible burden upon interstate commerce since it regulates evanhandedly and in a non-discriminatory manner, and effectuates a legitimate local public interest as part of the state's police powers. Its effects on interstate commerce are incidental and any resulting burden is not excessive in relation to local benefits derived. This is particularly true with respect to Respondents, which have predominant contacts in Michigan. Act 144 is also not unconstitutional based upon a need for national uniformity in the regulation of natural gas company securities since Congress, in exercising its power to regulate commerce, has established its intent in the federal statutory scheme that the states should retain such regulatory authority. Finally, no facts have been advanced in this facial challenge that would support a finding that Act 144 is unconstitutional on the basis that it impermissibly burdens interstate commerce.

ARGUMENT

I

ACT 144 DOES NOT VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

A. The federal preemption of state law is governed by congressional intent.

While the preemption doctrine has its roots in the Supremacy Clause, U.S. Const. art. VI, cl. 2, this Court has emphasized that "the critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm.* v. *Federal Communications Comm.*, 476 U.S. __; 90 L. Ed. 2d 369, 382 (1986).

In *Wardair Canada, Inc.* v. *Florida Dept. of Revenue*, 477 U.S. ____; 91 L. Ed. 2d 1 (1986), this Court emphasized that "the first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law, and where a congressional statute does not expressly declare that state law is to be pre-empted, and where there is no actual conflict between what federal and state law prescribe, we have required that there be evidence of a congressional intent to pre-empt the specific field covered by the state law."

The District Court (C.P.A. B-9), in evaluating Respondents' preemption claims, applied this Court's preemption standards summarized in *Michigan Canners & Freezers Assn.* v. *Agricultural Marketing & Bargaining Board*, 467 U.S. 461 (1984), and found that congressional intent to preempt state law may be found when: 1) Congress, in the federal enactment, explicitly mandates preemption of state law, *Shaw* v. *Delta Airlines*, 463 U.S. 85 (1983); 2) absent express preemptive language, Congress may manifest an implied intent to occupy the field of regulation, thereby displacing state regulations in

the same area, *Fidelity Federal Savings & Loan Assn.* v. *de la Cuesta*, 458 U.S. 141, 153 (1982), *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); and 3) state law actually conflicts with federal law, even in the absence of express preemptive language or implied congressional intent to preempt, which may occur when "complicance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)(C.P.A. B-8 and B-9).

When Congress legislates in a field which the states have traditionally occupied, the analysis starts with the assumption that the historic powers of the states are not superseded by the federal act unless that was the "clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). Clearly, regulation of energy utilities has long been a focus of local concern since it is one of the most important functions traditionally associated with the states' police power. *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm.*, 461 U.S. 375 (1983); *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm.*, 461 U.S. 190 (1983).

This Court in *Louisiana Public Service* extensively reviewed the preemption tests and held that "a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority." Furthermore, "an agency literally has no power to act, let alone pre-empt... unless and until Congress confers power upon it," and it "may not confer upon itself power" or "expand its power in the face of a congressional limitation on its jurisdiction." 476 U.S. ____; 90 L. Ed. 2d 369, 385 (1986).

In *California Coastal Comm., et al.* v. *Granite Rock Co.*, ____ U.S. ____; 55 U.S.L.W. 4366, 4369 (1987), this Court stressed that preemption by a federal administrative agency should

not be presumed merely by the extent or complexity of its regulations, but rather, that any administrative regulation which intends federal preemption of state law should declare such intention with some specificity.

The Court of Appeals's finding of preemption does violence to congressional intent established by the federal statutory framework governing the relationship of state and federal regulation of securities and natural gas. The Court of Appeals compounded its error by misapplying and misinterpreting the meaning of FERC's regulations, in addition to ignoring this Court's recent decisions concerning the standards by which federal regulations may preempt state laws.

B. Contrary to the Court of Appeals' ruling, Congress in the NGA did not implicitly preempt Act 144 for the purpose of removing state regulation of natural gas company securities.

Both the Court of Appeals and the District Court correctly held that "Congress has not explicitly preempted Act 144" since "neither the NGA nor the federal Securities Act of 1933. . . contains express preemptive language with respect to utilities securities transactions" (C.P.A. A-10). The Court of Appeals, however, erroneously found that because the NGA and Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. § 3301 *et seq.*, formed a "comprehensive" national gas policy, *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Board*, 474 U.S. ____; 88 L. Ed. 2d 732 (1986), which did not contain an "advance approval" form of utility securities regulation, "Congress has implicitly determined that the states should not impose such regulations." The basis for this finding was the statement in *Transcontinental* that "a federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate," 88 L. Ed. 2d 732, 744 (1986) (C.P.A. A-11).

1. The purpose of the NGA was to complement and strengthen state regulation and not to federally occupy the field of securities regulation, or to preempt or remove state securities regulation.

The Court of Appeals' finding that Congress implicitly intended to preempt or remove state regulation of natural gas company securities is directly contradictory to congressional intent. The Congress in the NGA sought to close regulatory gaps by complementing and strengthening state regulation, not by usurping or preempting it. This congressional purpose is fully explained in *Panhandle Eastern Pipe Line Co.* v. *Indiana Public Service Comm.*, 332 U.S. 507 (1947), wherein an interstate pipeline company challenged the Indiana commission's authority to regulate sales of natural gas transported interstate to an industrial end-user located in Indiana. Based upon the NGA's statutory provisions, legislative history, and the judicial history leading up to its enactment, this Court held that neither the NGA nor the Commerce Clause forbade such state regulation. *Id.* The Court found that the NGA was enacted to regulate in the area of sales for resale, and "not to any other sale." Its purpose "was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gaps created by the prior decisions" of this Court, and to occupy only that field of regulation held to be beyond the reach of state regulation.[12]

[12] The states had been the first to regulate utilities, as well as natural gas companies. By 1938, however, this Court had rendered several decisions delineating between permissible state regulatory control, including direct sales to local consumers, and areas in which the states could not intrude, such as sales for resale to local distributing companies. *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924); *Pub. Util. Comm.* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). The result of these judicial decisions was that some aspects of traditional state regulation of natural gas companies, such as sales for resale, were rendered beyond the reach of state power, which prevented direct state regulation of such transactions and handicapped the states in effectively regulating sales within their authority. Congress passed the NGA due to demands for federal

(footnote continued on next page)

332 U.S. 507, 517–519. Thus, the Court rejected the pipeline's claim that Congress in the NGA intended the federal government to "occupy the field" of natural gas regulation, stating instead that the NGA was "drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way" and "was not employed with any view to relieving or exempting any segment of the industry from regulation." *Id.*

The decision in *Panhandle Eastern* contains the prophetic comment that "[I]t would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about . . . more effective state regulation were construed . . . in a manner making the states less capable of regulation than before the statute's adoption" (332 U.S. 507, 519), and that Congress had in mind a "comprehensive and effective dual regulation" wherein the scheme "was one of cooperative action between federal and state agencies . . . to protect consumers against exploitation at the hands of natural gas companies." Further, the NGA's "historical setting, legislative history and objects" were such as "to show intention for the states to continue with regulation where Congress has not expressly taken over." 332 U.S. 507, 519–521.

Panhandle Eastern clearly demonstrates that the NGA's purpose is to complement and strengthen state regulation, to prevent regulatory gaps, and to preserve traditional areas of state regulation, unless Congress expressly assumed an area of regulation. In other words, Congress intended no preemptive purpose in enacting the NGA, but rather, a complementary, dual state and federal system of regulation. As later reemphasized, "Congress did not desire comprehensive *federal* regulation; much authority was reserved for the States," and

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regulation caused by the ensuing "impotence of the states to act in relation to sales for resale by interstate carriers" and to "reach those sales and prevent the hiatus in regulation their immunity caused." 332 U.S. 507.

it is "equally clear that Congress did not desire that an important aspect of this field be left unregulated." *Transcontinental Gas Pipe Line Corp.* v. *Federal Power Comm.*, 365 U.S. 1, 19 (1961).

Given the NGA's emphatic purpose to support state regulation and eliminate regulatory gaps, it is readily apparent that the NGA does not expressly grant FERC the authority to regulate natural gas company securities precisely because this regulatory power was already being exercised by the states when the NGA was passed. Furthermore, there is no indication in the NGA that Congress intended to deregulate state authority.

This Court's interpretation of the NGA's history and purpose, including its aim to strengthen and complement state regulation, is reinforced by the NGA's very language. The overall coverage of the NGA is established in § 1(b), 15 U.S.C. § 717(b), which limits federal regulation to primarily the transportation of natural gas in interstate commerce, the sale in interstate commerce of natural gas for resale, and to natural-gas companies engaged in such transportation or sale. Further, the NGA does "not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." *Id.* Thus, by its own terms, the NGA's primary jurisdictional section contains no broad preemptive language, but instead confines federal regulation to an area more restrictive than the varied regulation that may apply to a company having business operations, facilities and other relationships within a particular state.

Other sections of the NGA further evidence a congressional intent to respect state law and regulation. NGA § 8, 15 U.S.C. § 717g, requires natural gas companies to keep records as prescribed by FERC but expressly provides that the NGA does not operate to relieve such companies from any state record-keeping requirements. Similarly, § 9(a), 15

U.S.C. § 717h(a), grants FERC the authority to set appropriate depreciation rates, accounts and other requirements for natural gas companies, but contains the caveat that nothing in that section operates to limit state regulatory authority with respect to the percentage rate of depreciation or amortization to be allowed, among similar matters. Additionally, § 9(b), 15 U.S.C. § 717h(b), requires FERC to notify State regulatory commissions having jurisdiction over a natural gas company before prescribing accountings, records, depreciation rates and other matters, and to provide each state commission an opportunity to present its views.

Another significant provision is NGA § 17, 15 U.S.C. § 717p, which authorizes use of a joint state/federal board to further cooperation in the dual regulation of natural gas companies. FERC is authorized to refer matters arising under the NGA to the board and may confer with the state commissions regarding state regulation of natural gas companies. FERC is even authorized to hold joint hearings with any state commission. The section also obligates FERC to "make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies."

The purpose and objectives of the NGA, as evidenced by its language, legislative history, and decisions of this Court establish that Congress did not intend to preempt or replace state regulation with federal regulation nor is there any indication that the states were to forego their regulation of natural gas company securities.

2. Congress, in related federal statutes governing the regulation of securities, has expressly preserved state securities regulation.

The Court of Appeals' theory of implicit congressional preemption of Act 144 also overrides the congressionally mandated

statutory scheme that alternatively provides for the concurrent state/federal regulation of securities or the delegation of securities regulation to the states. Of primary importance is a sister statute to the NGA, the FPA, 16 U.S.C. § 791a *et seq.*, passed in 1935, which evidences unmistakable congressional intent to preserve state jurisdiction over utility securities, including those issued by companies operating in interstate commerce that may otherwise be subject to FERC regulation. Specifically, while the FPA grants FERC extensive regulatory powers over the rates, services and facilities of interstate electric utilities, FERC may regulate electric company securities only when state utility securities regulation does not exist, and expressly bars FERC such securities regulation when a state exercises such jurisdiction. See, FPA § 19, 16 U.S.C. § 812; § 20, 16 U.S.C. § 813; § 204, 16 U.S.C. § 824c; § 308, 16 U.S.C. § 825q (C.P.A. D-7 to D-10).

Of particular significance is FPA § 204, 16 U.S.C. § 824c, a federal "pre-issuance approval" securities statute similar to Act 144, which requires public utilities to obtain FERC authorization prior to issuing or assuming long-term securities or related obligations. Under this section, FERC must determine whether the issue is "for some lawful object within the corporate purposes of the applicant" which is "compatible with the public interest" and is "reasonably necessary . . . for such purposes." Consistent with other FPA provisions, FPA § 204(f), 16 U.S.C. § 824c(f), expressly preserves state utility securities jurisdiction by stating that "[t]he provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission."

FPA § 204, 16 U.S.C. § 824c, attests that Congress is fully aware of and familiar with traditional "pre-issuance" securities regulation. The congressional intent to preserve state securities jurisdiction is striking since it applies to utilities operating on an interstate basis that may be subject to federal regulation over rates, services or facilities. This display of congressional intent in the FPA to preserve state securities jurisdiction is

highly important since the legislative history and purpose of the FPA and NGA are very similar.[13] Moreover, this Court has found that the statutory provisions of the FPA and NGA are subject to interchangeable interpretation.[14]

Other federal statutes governing securities regulation further establish congressional intent to preserve state regulation of securities. The SA of 1933, 15 U.S.C. § 77a *et seq.*, which vests securities regulation with the Securities and Exchange Commission ("SEC"), recognizes concurrent state jurisdiction over securities through incorporation of the broad "nonpreemption" provision found in § 18 of the act, 15 U.S.C. § 77r (C.P.A. D-3).

Likewise, § 28(a), as amended, 15 U.S.C. § 78bb(a), of the SEA of 1934, 15 U.S.C. § 78a *et seq.*, recognizes concurrent state jurisdiction over securities by utilizing similar "nonpreemption" language. This provision was specifically cited by Justice Scalia in *CTS Corp.* v. *Dynamics Corp. of America.*, ____ U.S. ____; 55 U.S.L.W. 4478, 4485 (April 21, 1987), as language which "forcloses pre-emption on the basis of conflicting 'purpose' as opposed to conflicting 'provision.'" As noted, the NGA contains no statutory provision regarding securities which conflicts with Act 144.

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[13] As explained in *Arkansas Elec. Cooperative Corp.* v. *Arkansas Pub. Serv. Comm.*, 461 U.S. 375, 376-376 (1983), the FPA, like the NGA, was also passed by Congress to strengthen regulation and fill the regulatory gap created by previous decisions of this Court, including *Pub. Util. Comm.* v. *Attleboro Steam & Elec. Co.* 273 U.S. 83 (1927).

[14] In *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981), this Court noted in n. 7 as follows:

"7. Montana-Dakota Utilities was a case under the Federal Power Act rather than under the Natural Gas Act, but as we have previously said, the relevant provisions of the two statutes 'are in all material respects substantially identical.' FPC v Sierra Pacific Power Co, 350 US 348, 353 (1956). In this opinion we therefore follow our established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes. See, e.g., ibid.; Permian Basin Area Rate Cases, 390 US 747, 820-821, 20 L Ed 2d 312, 88 S Ct 1344 (1968)."

In addition, the PUHCA, 15 U.S.C. § 79 *et seq.*, which provides the SEC with regulatory authority over the securities issuances of public utility holding companies and their subsidiary companies, specifically preserves and reinforces state commission regulatory authority over the securities of companies subject to PUHCA. PUHCA § 6(b), 15 U.S.C. § 79f(b); § 7g(9), 15 U.S.C. § 79g(g); § 10j(f), 15 U.S.C. § 79j(f); § 320t(b), 15 U.S.C. § 79t(b); § 21, 15 U.S.C. 79u (C.P.A. D-4 to D-7). The latter section, § 21, 15 U.S.C. § 79u, constitutes yet another broad "nonpreemption" provision indicating congressional intent to preserve state securities jurisdiction.

In conclusion, the overall federal statutory scheme applicable to the regulation of securities establishes congressional intent to preserve, and not preempt, state securities regulation, even though federal agencies also regulate securities. The Court of Appeals' finding of "implicit" congressional preemption of Act 144 is completely contrary to federal securities statutes and with congressional intent to preserve state securities regulation.

3. Since Congress did not fully occupy the field of securities regulation, Respondents are not exempt from state securities regulation merely because of their status as natural natural gas companies subject to FERC regulation in other areas.

The fact that Respondents may be subject to FERC jurisdiction relative to rates, facilities and service, does not mean that they are exempt from state regulation in other areas. This principle was established in *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1946). In that case, the Court found that a 1931 amendment to the United States Warehouse Act, 7 U.S.C. § 241 *et seq.*, had extensively displaced state law with respect to grain warehouses operating under federal license. Despite the wide scope of federal regulation, the Court noted that there

were specific state law requirements not covered by the federal act, including a provision that grain warehouses obtain prior approval from the state before issuing or entering into long-term securities, contracts, and leases. This state regulatory measure, the Court found, was aimed at preventing unwarranted drains on utility funds or the creation of unsound financial structures affecting the ability of warehousemen to render adequate service at reasonable rates. 331 U.S. 218, 237. Because the federal Warehouse Act did not expressly regulate securities and since the Secretary of Agriculture made no attempt to exercise jurisdiction over such matters, this Court held there was no preemption of the state securities regulation. Stating that the "possibilities of conflict and repugnancy are conjured up" and that there "will be time to consider such asserted conflicts between the state and federal acts when and if they arise," this Court concluded that Congress had not foreclosed state securities regulation of the federally licensed grain warehouses. 331 U.S. 218, 237.

The case against preemption in this instance is more compelling than in *Rice*. In *Rice*, the Court noted that the United States Warehouse Act included a section that arguably preempted state law by providing that "the power, jurisdiction and authority conferred upon the Secretary of Agriculture under this Act shall be exclusive with respect to all persons securing a license hereunder so long as said license remains in effect." 331 U.S. 218, 229. In this case, however, no NGA provision exists vesting FERC with authority either to regulate natural gas company securities or preempt such state regulation.

Besides *Rice*, this Court in other circumstances has held that Congress' failure to occupy the entire field of regulation is not to be construed as an intention that the unoccupied portion remain unregulated so as to preclude all state authority. *Kelly* v. *Washington*, 302 U.S. 1 (1937); *Reid* v. *Colorado*, 187 U.S. 137 (1902); *Savage* v. *Jones*, 225 U.S. 501 (1911); *Mintz* v. *Baldwin*, 289 U.S. 346 (1933).

The Court of Appeals' citation of *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Board*, 474 U.S. ____; 88 L. Ed. 2d 732 (1986), for the proposition that the NGA and NGPA's comprehensive natural gas policy requires the implicit preemption of state securities regulation, erroneously equates the entire field of regulation involved in this case with the narrow area of regulation involved in *Transcontinental Gas*. However, the *Transcontinental Gas* case is inapposite because it involved a state law that attempted to regulate wholesale natural gas transactions in interstate commerce, a subject of federal regulation under the NGA and NGPA. The Court in *Transcontinental Gas* therefore found that the state law conflicted with the federal law and objectives of Congress. Here, the state regulation involves a separate and distinct subject area, e.g., securities, where no federal regulation is established under the NGA or NGPA. Furthermore, the state regulation of natural gas company securities cannot conflict with federal law, policy or objectives since there is no indication of a congressional intent to remove state securities regulation or to deregulate natural gas company securities.

Thus, the Court of Appeals' ruling is erroneous because it fails to recognize that Congress in the NGA and other federal statutes did not intend to occupy the entire field of natural gas or securities regulation. Rather, Congress had the opposite intention — not to preempt state utility securities regulation while strengthening and complementing state natural gas regulation. Thus, the states may regulate natural gas company securities.

C. Contrary to the Court of Appeals' ruling, Act 144 is neither implicitly preempted by FERC regulations nor does it conflict with the accomplishment and execution of the full purposes and objectives of Congress.

The Court of Appeals, in direct contradiction to its first theory of preemption (e.g., that Act 144 was implicitly

preempted by Congress for purposes of deregulating natural gas company securities reviews), additionally ruled that Act 144 was implicitly preempted by FERC regulations and by the Supremacy Clause because it conflicted with overall federal regulatory objectives. These findings of implicit preemption are similarly without merit.

1. The Court of Appeals erred in construing FERC regulations as constituting securities regulation because such regulation would be unlawful as being beyond its congressionally delegated authority.

The Court of Appeals found that Act 144 was implicitly preempted based upon a perceived conflict with FERC regulations adopted under the NGA. Specifically, the Court of Appeals pointed out that under NGA § 7(c), 15 U.S.C. § 717f(c)(1)(A), a natural gas company "must obtain a 'certificate of public convenience and necessity' before constructing, expanding, acquiring, or operating any facility involved in the transportation or sale of natural gas." Further, NGA § 7(e), 15 U.S.C. § 717f(e), grants FERC "the power to attach to the certificate. . . reasonable terms and conditions as the public convenience and necessity may require." Also, under FERC regulations (18 C.F.R. § 157.14[a]) an applicant is required to file with FERC a detailed plan for the project including an exhibit related to financing. The Court of Appeals concluded that by requiring natural gas companies to submit information regarding financing as part of the certificate application process, and by approving a certificate, "FERC, at least implicitly, has approved the financing plan," and therefore, Act 144 violates the Supremacy Clause, since "[o]nce FERC has approved a project and the underlying financing plan, a State cannot reject either the project or the financing plan" (C.P.A. A-12 to A-14).

The Court of Appeals' thesis that FERC's review of financing information for purposes of a § 7(c) certificate constitutes the equivalent of FERC securities regulation is erroneous because FERC simply does not have statutory jurisdiction under the NGA to engage in such regulation. Thus, if FERC were purporting to be undertaking actual securities jurisdiction, it would constitute an unlawful expansion of its agency authority.[15] Neither an expressed provision nor the legislative history of the NGA provides FERC with jurisdiction to undertake traditional securities regulation. As can be seen, Congress' omission in granting expressed securities jurisdiction to FERC in the NGA was intentional.

The FERC regulation relied upon by the Court of Appeals, 18 C.F.R. § 157.14(a)(14) (C.P.A. A-12 to A-14), and upon which its implicit agency preemption finding is based, was promulgated by FERC in 1952 (see 17 Fed. Reg. 7387, August 14, 1952) and remains unchanged to this date. Yet it is clear that FERC's interpretation of its own regulation has consistently been that it does not constitute securities regulation, as evidenced by the fact that for 25 years after promulgation of 18 C.F.R. § 157.14(a)(14), FERC repeatedly sought, without success, authority from Congress to regulate the issuance of securities by natural gas companies.[16] Typical of

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[15] As stated in *Louisiana Public Service Comm.* v. *Federal Communications Comm.*, 476 U.S. ____, ____; 90 L. Ed. 2d 369, 385 (1986), "a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority" because "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign state, unless and until Congress confers power upon it," and further, that "an agency may not confer upon itself power. . . [t]o permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress."

[16] As noted in the treatise, Loss, "Securities Regulation," Vol. I, 2d Ed., pp. 426-427 (1961), "Bills recommended by the Commission to regulate the issuance of securities by 'natural-gas companies' (as well as other persons seeking funds for the construction, acquisition or operation of any facility for which a certificate of public convenience and necessity

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these recommendations is the 1966 legislative recommendation by FERC which appears in its 1966 annual report to Congress.[17]

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is required under the Natural Gas Act) were introduced in 1949 and 1955, but were not reported out of committee. [See,] H.R. 5306 and S. 2746, 81st Cong., 1st Sess. (1949); S. 1880, 84th Cong., 1st Sess. (1955); see Natural Gas Act Amendments, Hearings before Subcom. of House Com. on Int. & For. Commerce on H.R. 5306, 81st Cong., 2d Sess. (1950); Amendments to the Natural Gas Act, Hearings before Senate Com. on Int. & For. Commerce on S. 712, S. 1880, etc., 84th Cong., 1st Sess. (1955); 30 FPC Ann. Rep. 133 (1950); 37 id 23 (1957)."

In an update to his treatise, 1 Loss, "Securities Regulation," Vol. IV, Supplement to 2d Ed., pp. 2458-2459 (1969), Professor Loss noted that later attempts likewise failed. "p. 426 n. 215, 1st par. Later bills have been no more successful despite the repeated recommendations of the Commission. See S. 1602 and H.R. 6950, 87th Cong. (1961); S. 1700 and H.R. 6790, 88th Cong. (1963); S. 1551 and H.R. 5870, 89th Cong. (1965); 40 FPC Ann. Rep. 18 (1960); 41 id 3, 22-23 (1961); 42 id. 13-14 (1962); 44 id. 7 (1964); 45 id. 159 (1965); 46 id. 11 (1966). The recommendation was not repeated in 1967."

While Professor Loss correctly noted that this recommendation was not repeated in 1967; it was, however, renewed in 1969, 1970, 1971, 1972, 1973, 1974 and 1975, again without success. See, 49 FPC Ann. Rep. 4 (1969); 50 FPC Ann. Rep. 8 (1970); 51 FPC Ann. Rep. 6 (1971); 52 FPC Ann. Rep. 8 (1972); 53 FPC Ann. Rep. 7 (1973); 54 FPC Ann. Rep. 6 (1974); 55 FPC Ann. Rep. 4 (1975). A review of legislative activity by the FERC fails to disclose any such recommendation since 1975.

[17] "The Commission recommends amendment of the Natural Gas Act to give the Commission jurisdiction over the issuance and sale of securities by natural gas pipeline companies which are subject to the act."

"The Commission believes that control over the issuance of securities by these companies, and over the practices employed in marketing them, is an important element of effective regulation. This is so because unsound financing can result in excessive cost of money to the company, in financial instability which can impair its credit, and in shortage of ready funds with which to maintain its operating properties in good condition. Thus, the ultimate result may be a decline in quality of service, a need for higher rates, or both. In addition, of course, such control would protect the interests of investors.

"Two circumstances give this proposal particular significance. First, natural gas pipeline companies are a growing industry. Even in markets already served demand for gas is increasing, and facilities must be expanded to cope with it. Secondly, natural gas pipeline companies are

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This legislative history is important since it shows that the Court of Appeals' construction of this regulation is inconsistent with FERC's own long-standing interpretation. Further, FERC's failed legislative initiatives reinforce the conclusion that Congress never intended to transfer securities jurisdiction over natural gas companies from the states to FERC. This is particularly significant since Congress has demonstrated its familiarity with "pre-issuance approval" securities statutes as indicated by FPA § 204, 16 U.S.C. § 824c(f). While this Court has been reluctant to draw inferences from Congress' failure to act, it would nonetheless appear improper for the Court to give a reading to the NGA that Congress never intended. *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm.*, 461 U.S. 190, 220 (1983).

The Court of Appeals' reference (*Id.*, A-14 to A-15) to the amendment of § 7 of the NGA in 1942, four years after the NGA's original passage, and to certain legislative history concerning the amendment referenced in *Federal Power Comm.* v. *Hunt*, 376 U.S. 515 (1964), does not really support the Court of Appeals' ruling. While the legislative language cited states that the "purpose of the amendments was to give the Commission an opportunity to scrutinize the financial set-up . . . the feasibility and adequacy of the proposed service . . . at a time when such vital matters can readily be modified as the public interest may demand," it is clear that such review is for the purpose of determining the need and feasibility of the project, and not to regulate the actual securities that may eventually be issued to finance the project.

The legislative history does establish that NGA § 7(c), as originally enacted in 1938, required a natural gas company to obtain a certificate of public convenience and necessity from FERC for the extenstion or construction of facilities or extension of service "to a market in which natural gas is already

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demonstrating increasing interest in other, non-utility businesses as additional sources of income. Often, however, these other businesses may entail a higher degree of risk than is present in utility operations. The possible effect of financial reverses in these non-utility enterprises makes desirable some preliminary investigation and review of the security issues needed to finance them." 46 Annual Report of the Federal Power Comm., p. 11 (Fiscal Year Ended June 30, 1966).

being served by another natural-gas company." The 1942 amendment sought to correct difficulties in the administration of § 7(c) that arose due to the fact that neither the word "market" nor the phrase "in which natural gas is already being served" were defined by the NGA. See, 1942 U.S. Code Congressional & Administrative News, p. 187. Previous experience demonstrated that the administration of § 7(c) involved "tedious and time-consuming preliminary investigations and hearings to determine whether the Commission has jurisdiction to consider, on the merits, the granting or denying the certificate." *Id.*, p. 188. Moreover, this limitation was also perceived as having an undesirable effect upon producers of competing fuels and competitive methods of transportation. *Id.* The purpose of the amendment therefore was to prevent unregulated competition, and economic waste, resulting from the construction of new interstate natural gas pipelines.[18]

In light of the foregoing, it is clear that part of the 1942 amendment to § 7(c) which provides that FERC has "the power to attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require" (15 U.S.C. § 717f[e]) was only intended to give FERC the authority to prevent uneconomic or otherwise undesirable facilities or extensions from being added onto the interstate natural gas pipeline system. In other words, until such time that a natural gas company has conformed its § 7(c) application, including financing, in a manner

[18] The more complete statement of the legislative history, 1942 U.S Code Congressional & Administrative News, p. 188, states: "By the unregulated construction of a pipeline, uneconomic construction , or inflated costs may make proper regulation of operation thereafter difficult or impossible. The bill when enacted will have the effect of giving the Commission the opportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure in connection with the proposed construction or extension at a time when such vital matters can be readily modified as the public interest may demand. Without such authority, the Commission may find itself confronted with a situation where it must either accept conditions which appear undesirable in the public interest, or require, subsequent to construction, changes which may have much more serious practical consequences than they would have had if they had been made before the public was asked to finance the enterprise."

that FERC deems is consistent with the public convenience and necessity, it will not be allowed to commence construction or connect such a proposed facility or extension to the system. The amendment thus allowed FERC to avoid economic waste caused by the building of unneeded facilities, and to prevent facilities from being readied for connection to the system without any advance review of their need or feasibility.

The authority for FERC to condition the granting of a § 7(c) certificate upon the issuance of certain types or amounts of securities does not equate to the assumption of regulatory jurisdiction over the securities themselves. The basis of FERC's jurisdiction lies with the certificate, not the securities. This is the key to understanding the error which the Court of Appeals made in concluding that NGA § 7(c) and (e) preempted Act 144's regulation of Respondents' securities.

Further indication that FERC regulation does not constitute securities regulation is found in 18 C.F.R. § 157.14(a)(14)(xii) (C.P.A. A-14), which requires the filing of information concerning "applications and supporting exhibits, registration statements . . . to the Securities and Exchange Commission." This provision constitutes recognition by FERC that a company applying for a certificate is subject to other regulatory authority relative to its securities. FERC's filing requirements are thus aimed at standardizing certificate applications for review purposes, and at permitting FERC an opportunity to better evaluate the certificate proposal and its feasibility.

The inescapable conclusion is that natural gas companies are not exempt from complying with state regulatory statutes governing securities merely because they may one day apply for a FERC certificate under NGA § 7. Further, by no means does NGA § 7 constitute securities regulation itself, as such jurisdiction has been withheld by Congress. NGA § 7 is woefully inadequate in detailing the standards, objectives, and scope of securities review to be undertaken, especially when it is compared to FPA § 204, 16 U.S.C. § 824c. Therefore, the Court of Appeals' ruling that NGA § 7 implicitly preempts Act 144 is explicitly erroneous.

2. Act 144 promotes, rather than conflicts with, the accomplishment and execution of the full purposes and objectives of Congress.

The final plank in the Court of Appeals' theory of implicit preemption is the overly vague observation that "even if Congress has not implicitly displaced state regulation in the natural gas industry, the Supremacy Clause invalidates state regulation to the extent that it conflicts with federal regulation" (C.P.A. A-15 and A-16). The Court of Appeals then found that Act 144 presents at least "the possibility of a conflict between federal and state regulation," based upon its own highly speculative *de novo* hypothetical situation where FERC could approve a pipeline construction project, only to have the MPSC "reject the proposal" (C.P.A. A-16). The Court of Appeals' hypothetical, however, is fantasy, clearly unsupported by appropriate facts or reasoning.

The Court of Appeals essentially holds that Act 144 conflicts with federal regulation because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. But as noted in Argument I-B, *supra*, the goal of Congress in enacting the NGA was to supplement, not supplant, state regulation. Further, Congress never envisioned that its public protection measures incorporated in the NGA § 7 certificate requirements would one day be used to invalidate a state securities law regulating natural gas companies. No section of the NGA has such a preemptive purpose, nor does any NGA section purport to immunize natural gas companies from a state securities law just because it may propose to construct a § 7 facility. In short, it is difficult to see how Act 144 is in conflict with the objectives of Congress in the NGA; e.g., to close regulatory gaps, establish effective complementary state and federal regulation to protect the public against exploitation by the natural gas companies, among related purposes.

Next, the hypothetical concludes, "once FERC has approved a project and the underlying financing plan, a state cannot reject either the project or the financing plan" (C.P.A. A-15). But this statement has no application to this case. Act 144 does not provide for a review of "the project," which FERC undertakes in a § 7 certificate case, nor does the MPSC review a "financing plan." Rather, the MPSC reviews securities issuances for the limited purposes outlined in Act 144. The MPSC's function is to determine if there "is a need to issue securities to obtain funds for a lawful purpose of the utility and does not extend to whether, to accomplish that purpose, there is a need for the project to which the funds will be devoted." *Attorney General* v. *MPSC*, 412 Mich. 385; 316 N.W.2d 187, 190 (1982). Thus, an Act 144 proceeding "is limited to a review of the financial decisions of the utility." *Id.*, 316 N.W.2d 187, 193. Accordingly, there is no regulatory conflict involved because FERC's review involves a separable and distinct regulatory subject from Act 144 regulation.

The Court of Appeals' hypothetical also lacks credibility. It assumes that Act 144 was adopted for a parochial or discriminatory purpose, yet the language and history of Act 144 belie such a claim. The hypothetical further assumes that Michigan officials will administer Act 144 in a parochial or discriminatory manner, contrary to this Court's view that it would not "assume in advance that a state will so construe its law as to bring it into conflict with the federal constitution or an act of Congress." *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740, 746 (1941). As a corollary, the hypothetical assumes that officials of natural gas companies will always act lawfully in good faith, and that securities regulation can therefore be dispensed with. No facts in this case can possibly support such findings.

Additionally, the hypothetical ignores the limited scope of Act 144, and the fact that FERC certificate review does not apply to Respondents except for purposes of planning the construction of facilities. It is precisely those situations in which securities are issued for purposes other than construction that

require the scrutiny provided by Act 144 to prevent unlawful securities, overleveraging, and other evils of overcapitalization, all of which would directly affect the local populace served by Respondents' facilities. Also important is that fact that this case was not initiated before an administrative agency, nor has it been subject to review by a lower court based upon the facts of an agency decision. No known example of a "conflict" between state and federal regulation has occurred in the 78-year history of Act 144.

Further, the Court of Appeals' suggestion of "imminent possibility" of a conflict between Act 144 and FERC's regulation, 18 C.F.R. § 157.14(a)(14), again ignores the evidence. The Court cites, as analogous, the case involving Louisiana's first use tax on natural gas flowing in interstate commerce, *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), and the state statute involved in *Northern Natural Gas Co.* v. *State Corp. Comm.*, 372 U.S. 84, 92, *reh. den.* 372 U.S. 960 (1963). But these cases are simply not applicable. *Maryland* involved a situation where Louisiana actually was commencing its collection of a discriminatory tax, while in *Northern Natural Gas*, the Court found that the state was attempting to regulate in an area (e.g., interstate wholesale gas purchases) which had been assigned by Congress to FERC. Here, there exists no basis whatsoever for a suggestion of any "imminent possibility" of a conflict occurring between MPSC securities regulation and FERC review of construction projects.

Perhaps what is most important is that the hypothetical, besides its sheer unlikelihood, really is not a conflict at all when the objectives of Congress in the NGA are understood. FERC's powers under the NGA and the MPSC's powers under Act 144 are complementary in nature, although they involve separate areas of regulation. As noted, the purpose of the § 7 certificate procedure was to grant FERC powers to scrutinize projects for need and feasibility before construction begins so as to reject projects which are unnecessary. The certificate power was not passed by Congress for the purpose of making FERC a promoter of, or participant in, the projects

themselves, as assumed by the Court of Appeals. FERC's role is with regard to the certificate review, a form of screening process. At the same time, the MPSC's role is to protect the public interest with respect to other matters involving securities. The public protection purposes and actual regulatory roles underlying Act 144 and NGA § 7 are thus in all respects complementary, not conflicting. Quite simply, the fact that a natural gas company may have to comply with other laws and prerequisites for constructing a pipeline besides obtaining a FERC certificate does not render all other such laws in conflict with FERC regulations and therefore subject to preemption.

In conclusion, not even a hypothetical conflict can occur between Act 144 procedures and the FERC certificate regulation since both laws operate wholly in accordance with congressional intent. Act 144 plainly does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

II

MICHIGAN'S ACT 144 IS NOT UNCONSTITUTIONAL AS AN IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE.

A. Act 144 is not *per se* invalid.

The Court of Appeals, citing *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. ____; 90 L. Ed. 2d 552 (1986), erroneously found Act 144 unconstitutional as a burden on interstate commerce on the basis that Act 144's "requirement that plaintiffs-appellants obtain 'advance approval' from the MPSC before issuing securities, the proceeds of which may be used to finance a project in another State, directly regulates commerce" (C.P.A. A-18). In *Brown-Forman*, however, the state law found to be *per se* invalid attempted to control wholesale liquor prices in a manner which would guarantee economic benefits to New York, but at the expense of unduly controlling economic pricing decisions in

other states. In short, the act had as its purpose economic protectionism or parochialism.

As the District Court's thorough findings establish (C.P.A. B-16 to B-24), Act 144 is unlike the state law in *Brown-Forman* since Act 144 does not discriminate against interstate commerce, and has not been established or enforced to benefit local commerce over interstate commerce. Contrary to the District Court's findings, the Court of Appeals' conclusion concerning the *per se* invalidity of Act 144 lacks credibility due to the Court's sole reliance on imaginary facts and hypothetical suppositions. Neither the evidence nor Respondents' pleadings suggest that Act 144 "regulates or discriminates against interstate commerce" or that "its effect is to favor in-state economic interests over out-of-state interests," as found in *Brown-Forman*. The Court of Appeals' sweeping conclusion thus amounts to a finding that any state regulation of a business engaging in interstate commerce "directly regulates" interstate commerce. Clearly, such a finding cannot stand.

B. Act 144 is not invalid under the *Pike* v. *Bruce Church* balancing test.

Act 144 fully meets the requirements for constitutional validity under the balancing test used by this Court in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Huron Cement Co. v Detroit, 362 US 440, 443, 4 L Ed 2d 852, 856, 80 S Ct 813, 78 ALR2d 1294. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Thus, the balancing test inherently recognizes that state regulation may have some effect upon interstate commerce, yet such regulation will not be invalid for that reason alone. Rather, the test balances the local and interstate interests involved.

1. Act 144 regulates evenhandedly to effectuate a legitimate local public interest.

Clearly, the District Court was correct when it found that Act 144 "regulates evenhandedly to effectuate a legitimate local public interest" (C.P.A. B-21). Act 144 applies equally to all intrastate utilities and those natural gas companies having predominant contacts with Michigan, such as Respondents. Moreover, Act 144 has never been administered, nor was it adopted, for purposes of economic protectionism or to discriminate against interstate commerce.

The legitimate local public interest served by Act 144 was explained by the Michigan Supreme Court in two cases involving similar facts to the case at bar. In *Indiana & Michigan Power Co.* v. *MPSC*, 405 Mich. 400; 275 N.W.2d 450 (1979), the Michigan Supreme Court concluded that Act 144 was motivated "by the evils and injurious effects on the public of overcapitalization" and "was intended to, and does, protect interests which rate regulation alone could not effectively control." 275 N.W.2d 450, 453. The court in *I&M Power* further found that Act 144 serves the interest of investors, creditors, and those of ratepayers in insuring "efficient and uninterrupted service at reasonable rates." 275 N.W.2d 450, 453. The Michigan Supreme Court in *Michigan Gas Storage Co.* v. *MPSC*, 405 Mich. 376; 275 N.W.2d 457, 462 (1979), added that Act 144 was proper securities regulation that furthered the general interest of the citizenry in efficient and reliable service since the "physical property of a company within the state, essential to the company's ultimate service to the public, could be jeopardized by inadequate financing, resulting in a failure in that service."

In *Attorney General* v. *MPSC*, 412 Mich. 385; 316 N.W.2d 187 (1982), the Michigan Supreme Court observed that an important purpose of Act 144 is to determine whether securities are being issued for a lawful purpose. In this regard it must be ascertained whether the type and amount of the securities is essential to the successful carrying out of the purpose of the regulated company. M.C.L. 460.301(3). Moreover, Act 144 review looks primarily at the financial decisions of the utility, and not the need for underlying utility facilities being constructed with the funds, if it is a construction situation.

Act 144 is thus aimed at protecting the public from the adverse effects that could arise due to overcapitalization, unscrupulous transactions or unlawful securities issuances. Act 144 thus is both a deterrent and a tool for the protection of the public.[19]

Act 144, as a valid exercise of the state's police power, finds support in decisions of this Court which declare that the Commerce Clause did not withhold from the states the power to regulate matters of local concern where Congress has not exercised its power, even though the regulation affects interstate commerce. In *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 35-36 (1980), this Court stated that the Commerce Clause "limitation upon state power. . . is by no means absolute" and that "[i]n the absence of conflicting federal legislation, the states retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interest commerce may be affected," citing *Raymond Motor Transportation, Inc.*, v. *Rice*, 434 U.S. 429, 440 (1978), and *Great A&P Tea Co.* v. *Cottrell*, 424 U.S. 366, 371 (1976).

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[19] As indicated in the statement of the case, see p. 4-5, the MPSC properly utilized Act 144 to inquire into ANR's attempt to obtain important operating assets from its wholly owned subsidiary, MCGC, immediately prior to divestiture. Such proposed transactions would have detrimentally affected MCGC's ability to provide adequate, reliable, and reasonably priced gas service.

In *Huron-Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960), this Court held that a local air control ordinance was not unconstitutional as a burden on interstate commerce when it was applied to steam vessels operating in interstate commerce which were licensed and comprehensively regulated by the federal government. The Court found that the city code was an exercise of the police power, and that "[t]he mere possession of a federal license. . . does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce." 362 U.S. 440, 447. The Court found no basis in the record for finding a violation of needed uniformity or of conflicting or competing local regulations, concluding, "[s]tate regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." 362 U.S. 440, 448. On a number of other occasions, this Court has similarly held that a state statute passed pursuant to the legitimate use of the state's police powers is not a burden on interstate commerce although it may affect commerce. *Savage* v. *Jones*, 225 U.S. 501 (1911); *Bradley* v. *Ohio Public Utilities Comm.*, 289 U.S. 92 (1932); *Kelly* v. *Washington*, 302 U.S. 1 (1937); *South Carolina State Hwy. Dept.* v. *Barnwell Bros.*, 303 U.S. 177 (1937); *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761 (1944); *Panhandle Eastern Pipe Line Co.* v. *Indiana Public Service Comm.*, 332 U.S. 507 (1947); *Head* v. *New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963).

In short, Michigan may regulate Respondents' securities under its police powers to accomplish the legitimate local purposes of Act 144. Further, the Commerce Clause does not even apply to protect interstate transactions in unlawful securities, which is one of the targeted areas of Act 144. See analogous point in *Kelly* v. *Washington*, 302 U.S. 1, 15, and *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 143-144. Clearly, Respondents' theory, that they are exempt from Act 144 merely because they operate in interstate commerce and have some aspect of their activities federally regulated, must be rejected.

Furthermore, as found by the District Court (C.P.A. B-17 to B-19), Act 144 is properly applicable to Respondents to carry out the limited, but important, objectives of the Act. As fully detailed in the statement of the case, Respondents also have substantial contacts to Michigan which affect the public interest. Pipeline, headquartered in Michigan, is a predominant natural gas supplier to Michigan, and has more contact with Michigan in terms of facilities, operations, investment, sales and supply responsibilities than any other state. Pipeline supplies the peak winter requirements of its customers in Michigan and Wisconsin from its Michigan-operated storage fields, some of which have been developed by invoking certification authority from the MPSC and condemnation proceedings in Michigan courts. Its various facilities literally crisscross the state. Moreover, Pipeline's unique and major role as a primary natural gas supplier to Michigan can also not be overemphasized. Its provision of natural gas to Michigan is integral to the state's economic well-being, and to its citizens.

Storage, a separate corporation, neither engages in any interstate transportation or sale of gas, nor has any FERC-approved transportation tariffs. Storage, incorporated and headquartered in Michigan, conducts solely a gas storage business with all of its facilities, operations, and investment in Michigan. Notably, this Court upheld a state's securities law in recognition of a state's right to regulate aspects of a corporation organized pursuant to that state's law. *CTS Corp.* v. *Dynamics Corp. of America*, ____ U.S. ____; 55 U.S.L.W. 4478 (April 21, 1987).

Clearly, Respondents thus are not ordinary companies in commerce, with incidental contacts in Michigan. Rather, Respondents have a major and overwhelming presence in Michigan, operating facilities and conducting functions that integrally affect the public health, safety and welfare of Michigan's citizens.

The District Court thoroughly analyzed the facts in this case under the *Bruce Church* balancing test and concluded that Act 144 effects a legitimate local public interest (C.P.A. B-17 to B-19). The District Court specifically noted that a financial failure of either Storage or Pipeline due to overcapitalization would directly impact this state, affect private property rights, and pose a safety threat if facilities were inadequately maintained due to inadequate financing. Therefore, the District Court concluded that "[t]he mere fact that plaintiffs sell natural gas in interstate commerce, or contract for its storage solely with out-of-state customers, does not render the state powerless to regulate any of their activities where local public interests such as those listed above are served by the regulation." *Id.*, B-19.

2. Act 144's effects on interstate commerce are incidental, and the burden on commerce is not excessive in relation to the local benefits.

Act 144 also meets the second aspect of the *Bruce Church* test because its effects on interstate commerce are only incidental and are not excessive in relation to the local benefits. Unlike the Court of Appeals, which divorced itself from the factual and legal background of this case, the District Court fully analyzed Act 144 under this part of the *Bruce Church* test (C.P.A. B-20 and B-21). The District Court found Act 144 to be limited in scope, since it applies to long-term securities while exempting from MPSC review short-term borrowings having a duration of less than 24 months. M.C.L. 460.301(3) and 460.301(4). As such, Respondents are afforded considerable flexibility in financing their operations over annual business cycles, without any MPSC review.[20]

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[20] The facts indicate that Respondents for the most part operate with short-term securities as explained in their various report filings (J.A. 69-70, 76, 94-97). Also, both Pipeline and Storage in 1983 had very minimal construction projects under way subject to FERC authority, as indicated in its formal reports (J.A. 94-97).

The District Court therefore concluded that the MPSC's discretion under Act 144 is thus "sufficiently circumscribed so as to minimize, if not elimiate, the likelihood of arbitrary decisions based on purely parochial concerns." *Id.*, B-21. Moreover, Act 144 grants the right to immediate judicial review, and essentially provides that an MPSC order approving securities is binding for purposes of issuing securities if no stay has been granted by the reviewing court within 30 days. M.C.L. 460.301(7).

Importantly, the facts show that MPSC's review of Respondents' securities applications has been routinely expeditious. On this basis, the District Court found that there was no evidence to suggest that any FERC proceeding had ever been impeded by Act 144. The District Court therefore concluded that "the record reveals...an evenhanded and relatively limited state regulation which, as applied to plaintiffs, has historically had an indirect and minimal effect on interstate commerce," and that "[i]n light of legitimate local public interest previously identified, this is not a regulation which violates Commerce Clause principles under the *Bruce Church* analysis." *Id.*, B-21.

3. The nature of the local interest involved and the minimal effect on interstate commerce establishes that Act 144's purposes cannot be promoted as well with a lesser impact on interstate activities.

Respondents have not proposed any alternative means by which Michigan could carry out the purposes of Act 144. Furthermore, this aspect of the test appears more suited to legislative, rather than judicial, judgment. See *South Carolina State Hwy. Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 189–196 (1937). This may be true as well with respect to the determination whether the burden on commerce imposed by a state statute "is clearly excessive in relation to the putative local

benefits," as indicated by Justice Scalia's concurring opinion in *CTS Corp.* v. *Dynamics Corp. of America*, ____ U.S. ____; 55 U.S.L.W. 4478, 4485 (April 21, 1987).

The critical point, however, is that Congress, under its Commerce Clause power to regulate commerce, has already expressed its intention in the NGA that those regulatory powers, not expressly granted to FERC, shall remain with the states. As noted, in related federal securities statutes Congress has provided that state securities regulation be preserved and not preempted. Many state legislatures, including Michigan, have exercised their police powers through the enactment of statutes such as Act 144, and Congress has ratified this regulatory scheme through various federal enactments. Michigan therefore submits that Act 144 serves important purposes, is reasonably tailored, and has no discernible impact on interstate commerce. Therefore, no reason exists to consider regulatory alternatives.

C. Act 144 is not unconstitutional based upon the need for national uniformity in the regulation of natural gas company securities.

The Court of Appeal erroneously held (C.P.A. A-19 to A-21) that Act 144 burdens interstate commerce because it regulates an area that requires national uniformity. This finding is contrary to congressional directives and intent. As this Court has held, Congress has the power under the Commerce Clause to determine how commerce is to be defined and regulated. *Western & Southern Life Ins. Co.* v. *California State Board of Equalization*, 451 U.S. 648 (1981). Congress, by expressly preserving state regulation, has already determined in the federal statutory scheme governing both natural gas and securities (Brief, Argument I) that the regulation of natural gas company securities does not require national uniformity. As a result, Act 144 cannot be invalidated on this basis. The

Court of Appeals' decision to the contrary renders this congressional judgment a nullity.

Furthermore, as the District Court noted (*id.*, B-21 to B-24), the cases cited by Respondents to support their argument that Act 144 is a burden on interstate commerce based upon "uniformity" principles are simply not applicable. Two of the cases involved airline financing where the airline had extremely minimal contact with the state regulating the securities. *United Airlines, Inc.* v. *Illinois Commerce Comm.*, 32 Ill. 2d 516; 207 N.E.2d 433 (1965), and *In re United Airlines, Inc.*, 172 Neb. 784; 112 N.W.2d 414 (1961). These cases may also be distinguished on the basis that federal regulation of air carriers and air traffic has been much more pervasive than in utility matters, and the nature of congressional authorization for states to regulate may be more limited than is true with respect to natural gas company securities. See 49 U.S.C. § 1305(a)(1).

The case of *Panhandle Eastern Pipe Line Co.* v. *Ohio Public Utilities Comm.*, 56 Ohio St. 2d 334; 383 N.E.2d 1163 (1978), is instructive because it involved a situation where there was very minimal contact between Ohio customers and the pipeline involved, particularly with respect to gas sales and revenue volumes. The Ohio Supreme Court indicated at the outset of its opinion (383 N.E.2d 1166) that it was not deciding whether the Ohio statutes were unconstitutional on their face, but was only deciding whether the statutes were unconstitutional as applied. Here, Respondents have asserted that Act 144 is unconstitutional on its face, but have been unable to present one instance in which the MPSC has improperly applied Act 144. Using the "as applied" analysis, the Ohio Supreme Court in *Panhandle Eastern* v. *Ohio* concluded that the contacts of the business with the forum state were not enough to justify the state statute when balanced against the adverse effects to interstate commerce that would result from its enforcement. Such is not the case here.

State Utilities Comm. v. *Southern Bell Telephone & Telegraph Co.*, 288 N.C. 201; 217 S.E.2d 543 (1975), is another case involving an "as applied" analysis. The statute in the *Southern Bell* case apparently required the state commission to approve even short-term securities, which would require even daily approvals, which is considerably different than the more flexible and limited type of regulation provided by Michigan's Act 144, which applies to long-term securities.

In *Natural Gas Pipeline Co.* v. *Illinois Commerce Comm.*, 33 Ill. 2d 214; 210 N.E.2d 490 (1965), a case cited by the Court of Appeals (C.P.A. A-14), similarly did not involve the predominant contacts which exist between Respondents and Michigan. In the case at bar the local interests are substantial but the impact on interstate commerce is incidental. Furthermore, *Natural Gas Pipeline*, to a large degree, relied upon certain fallacious assumptions relating to the *Hunt* case, including the conclusion that equated FERC's review of initial financing for proposed construction projects as being equivalent to traditional securities regulation. This premise is decidedly wrong as detailed earlier in this brief.

No evidence establises that national uniformity is required with respect to Respondents' securities. No actual conflict between states, or states and the federal government, has been cited, nor has any such conflict ever occurred in the 78-year history of Act 144. Further, the facts show that other states lack the predominant interests that Michigan has relative to Respondents. As the District Court found, no other state other than Michigan has contacts with Storage that could justify regulation of Storage. As to Pipeline, only Wisconsin has an interest that could approach that of Michigan's. *Id.*, B-23. In a related context, in *Panhandle Eastern Pipe Line Co.* v. *Indiana Public Service Comm.*, 332 U.S. 507 (1947), this Court rejected similar uniformity arguments in upholding state regulation of natural gas. Act 144's status as an exercise of the

local police power further undermines the "uniformity" theory.

In conclusion, there is no basis, either legal or factual, to establish that a need exists for national uniformity in the regulation of natural gas company securities.

D. The Court of Appeals' decision is based upon nonrecord imaginary assumptions and an improper Commerce Clause analysis.

The Court of Appeals erred in its Commerce Clause analysis because it neither reviewed nor considered the complementary purposes and objectives of the NGA and of Act 144. Since Congress established a statutory framework which preserved the states' ability to regulate the securities issuances of natural gas companies, a Commerce Clause challenge is not well-founded. Further, since act 144 was passed pursuant to the state's police power, it has added legitimacy when analyzed under the Commerce Clause.

The Court of Appeals, unlike the District Court, also failed to recognize that the balancing test in *Pike* v. *Bruce Church*, 397 U.S. 137 (1970), itself acknowledges that a state statute can affect interstate commerce and still be lawful. By its very nature the balancing test measures the local interest to its effect on interstate commerce. The Court of Appeals thus failed to conduct any legitimate analysis under the *Bruce Church* balancing test.

For instance, at a key juncture, the Court of Appeals, without any supporting facts or reasoning, simply concludes that "the alleged benefits reveals that they do not further important state interests," and that "[t]he problem of overcapitalization is largely related to the construction, expansion, and acquisition of natural gas facilities," and that FERC "exercises sufficient control over such decisions by issuing 'certificates of public convenience and necessity'" and by

regulating rates "that 'natural-gas companies' can charge" (C.P.A. A-17 to A-21). The Court of Appeals' one-sentence statement, at the stroke of a pen, negates the District Court's thorough analysis (C.P.A. B-16 to B-24). No explanation is provided. The Court of Appeals then proceeds to the patently unsupportable finding that over-capitalization is largely related to the "construction, expansion, and acquisition of natural gas facilities," which are sufficiently regulated by FERC. Again, no record basis whatsover exists to support this finding.

The Court of Appeals' bare-bones analysis not only is deficient in assuming that securities are issued only for construction purposes, but also because it treats Pipeline and Storage as though they were precisely the same. Clearly, they are not as is demonstrated in the statement of the case. See, pp. 5–10. Essentially, the Court of Appeals' analysis thus holds that a business such as Storage, located wholly within Michigan, cannot be regulated pursuant to the state's police powers because it sells services to out-of-state customers. This conclusion severely misconstrues proper Commerce Clause analysis. The fact that Act 144 may conceivably affect interstate commerce does not mean that it constitutes an impermissible burden. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981); *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm.*, 461 U.S. 375 (1983); *Wardair Canada, Inc.* v. *Florida Dept. of Revenue*, 477 U.S. ____ (1986); *CTS Corp.* v. *Dynamics Corp. of America*, ____ U.S. ____; 55 U.S.L.W. 4478 (1987).

Further, even though Pipeline or Storage may engage in wholesale transactions does not automatically exempt them from reasonable state regulation relative to areas that are not congressionally assigned to FERC, or are not regulated by FERC. *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm.*, 461 U.S. 375 (1983). The commerce analysis under the *Bruce Church* test is more case specific and flexible

than the old "bright lines" which were drawn in earlier cases, and which have been modified by this Court's analysis in *Arkansas Electric*. Congress did not intend the NGA to exempt natural gas companies from state regulation with respect to other areas merely because of federal regulation of wholesale transportation or sales in interstate commerce. Such a result would be contrary to Congress' intent to strengthen state regulation and prevent regulatory gaps.

The Court of Appeals additionally suggests that FERC's regulation of Respondents' rates is a factor to be considered. But the existence of FERC's ratemaking power does not mean that the separable and important tool of securities regulation must be avoided. One complements the other. FERC regulation of the rates of natural gas companies, which involves largely an "after-the-fact" review of the decisions of utilities, does not itself justify the conclusion that state securities regulation providing for preissuance (or postissuance) review of utility financing is unconstitutional. A similar "one-tool" argument has been already rejected by this Court in *Pacific Gas & Electric* v. *State Energy Resources Conservation & Development Comm.*, 461 U.S. 190, (1983).

The Court of Appeals (C.P.A. A-19, n. 8) also erroneously suggests that Petitioners are contradictory in citing the flexibility and expeditious nature of Act 144, while also citing its importance in protecting the public interest. These are not contradictory in any manner, since Act 144 can be, and has been, administered swiftly with respect to financings which are legitimate and lawful. This does not diminish the importance of Act 144 as a tool to deter the hopefully infrequent situation in which a proposed financing is either unlawful or would result in an overcapitalization situation. Finally, the parting conclusion that Michigan's securities regulation, as applied to Pipeline and Storage, involves "burdens of expense, delay, and administrative hassle" (C.P.A. A-20) is just not supported by the facts.

This Court in *Panhandle Eastern* and *Arkansas Electric* has indicated its long-standing practice to refuse to either preempt state law or to find Commerce Clause violations based upon hypothetical situations or imaginary facts. On this basis, the Court of Appeals' decision should be reversed.

CONCLUSION

Petitioners respectfully request this Honorable Court to reverse the decision of the Court of Appeals below, and find that Michigan's Act 144 is neither preempted by federal law nor does it constitute an impermissible burden on interstate commerce.

Respectfully submitted,

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DATED: May 9, 1987

RESPONDENT'S

BRIEF

No. 86-986

FILED
JUL 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

MICHIGAN PUBLIC SERVICE COMMISSIONERS
ERIC J. SCHNEIDEWIND, EDWYNA G. ANDERSON
and MATTHEW E. MCLOGAN,
Petitioners,

v.

ANR PIPELINE COMPANY and
ANR STORAGE COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether the Natural Gas Act preempts a state public utilities statute which requires advance approval of securities issued by natural gas companies that conduct business *exclusively* in interstate commerce.

2. Whether a state public utilities statute which requires advance approval of securities issued by natural gas companies that conduct business *exclusively* in interstate commerce violates the Commerce Clause.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-986

MICHIGAN PUBLIC SERVICE COMMISSIONERS
ERIC J. SCHNEIDEWIND, EDWYNA G. ANDERSON
and MATTHEW E. MCLOGAN,
Petitioners,

v.

ANR PIPELINE COMPANY and
ANR STORAGE COMPANY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR RESPONDENTS

STATEMENT

A. Parties

Respondents ANR Pipeline Company ("Pipeline Company") and ANR Storage Company ("Storage Company") are "natural gas companies"[1] subject to regulation by the Federal Energy Regulatory Commission ("FERC")

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[1] "Natural gas companies" are defined in the Natural Gas Act as persons engaged in the "transportation" or "sale . . . for resale" of natural gas in interstate commerce. 15 U.S.C. § 717a(6). The provisions of the Natural Gas Act "apply to the [1] transportation of natural gas in interstate commerce . . . [2] sale in interstate commerce of natural gas for resale . . . [and to the] natural gas companies engaged in such transportation or sale . . . ." 15 U.S.C. § 717(b).

under the Natural Gas Act, 15 U.S.C. §§ 717, *et seq.* J.A. at 66, 74. Neither Pipeline Company nor Storage Company engages in any intrastate or "retail" natural gas distribution in Michigan (J.A. 60) and, accordingly, the district court properly found that petitioners, who are the members of the Michigan Public Service Commission ("MPSC"), do not exercise "general regulatory jurisdiction" over either company. Pet. App. A5, G6.[2]

Pipeline Company owns and operates an interstate natural gas pipeline system which transports and sells gas, for resale only, to 51 gas distribution customers in nine states. J.A. 61; Pet. App. B3. Pipeline Company purchases natural gas from producers in Texas, Oklahoma, Kansas, Louisiana and Wyoming and uses large-diameter pipelines to transport the gas to the midwestern United States, primarily to local distribution companies in Michigan and Wisconsin. Pet. App. A6. It sells no gas to ultimate consumers in Michigan.

Storage Company owns and operates underground gas storage reservoirs in Michigan to store natural gas for other companies, none of which is affiliated with Storage Company.[3] J.A. 70; Pet. App. B4. During the summer, Storage Company receives natural gas from customers and stores the gas in its reservoirs. Upon demand, usually during the winter, Storage Company delivers the gas to its customers through the nationwide interstate pipeline network. Pet. App. A6-A7; J.A. 72-74, 76. None of that gas is sold within Michigan.

[2] Michigan Consolidated Gas Company ("MCGC") was a wholly-owned subsidiary of respondents' parent company, American Natural Resources Company ("ANR"), until the end of 1981 when ANR divested itself of ownership of MCGC's stock. In stark contrast to respondents, MCGC is a local distribution company involved in "retail gas distribution" in Michigan and, therefore, is fully subject to the general regulatory authority of petitioners. J.A. 59-60.

[3] Storage Company properly is classified as a "natural gas company" under the Natural Gas Act because the storage of natural gas is a necessary and integral part of interstate transportation. Pet. App. A5, *quoting Columbia Gas Transmission Corp.* v. *Exclusive Gas Storage Easement*, 776 F.2d 125 (6th Cir. 1985).

Petitioners repeatedly state that both Pipeline Company and Storage Company have substantial "contacts" with Michigan.[4] See Pet. Br. 5-10. These "contacts", however, are purely interstate in nature. For example, in Michigan, Pipeline Company owns and operates 773 miles of transmission pipeline, 195 miles of field and storage pipeline, two transmission compressor stations and 10 storage compressor stations. Although this represents a tangible presence inside the state, the vast majority of Pipeline Company's assets and operations are outside of Michigan. Pipeline Company owns and operates 6,947 miles of transmission pipeline, 3,507 miles of other pipeline, 35 transmission compressor stations and 54 field compressor stations outside the state. J.A. 62-64; Pet. App. B-4. In terms of the dollar value of this capital investment, only 19% of Pipeline Company's total plant investment was located in Michigan as of December 31, 1983. J.A. 113. Even more important, none of the transactions supported by these facilities involves a sale to a final consumer in Michigan.

Similarly, although Storage Company is located in Michigan, J.A. 70-71, Storage Company does not serve any Michigan consumers and, indeed, Storage Company has *no* utility customers in Michigan. J.A. 72-74. *All* of the gas stored by Storage Company is supplied from outside of Michigan by Storage Company's customers. Upon withdrawal from storage, *all* of this gas is transmitted to Storage Company's customers for use *outside* the State of Michigan. J.A. 72; Pet. App. B5.

[4] For example, in 1983, approximately 50% of Pipeline Company's wholesale sales of natural gas, by volume, were in Michigan. J.A. 65, 92. Storage Company is incorporated in Michigan and has all of its facilities and operations there. J.A. 59, 71-73.

The natural gas industry is highly capital-intensive. J.A. 69. The issuance of various forms of securities to finance the construction of transmission and storage facilities is a regular and "essential" aspect of the business of both Pipeline Company and Storage Company. J.A. 69-70, 76; Pet. App. A8-A9. Both Pipeline Company and Storage Company use the services of Wall Street investment banking firms to issue and sell their securities in national and international financial markets. J.A. 77. Michigan residents are able to invest in Storage Company's and Pipeline Company's securities only to the extent that they, like residents of any other state or foreign country, invest in the national and international securities markets. J.A. 77, Pet. App. A8-A9. Thus, the interests of Michigan residents as investors in and creditors of respondents are identical to the interests of such investors and creditors in every other state.

B. Regulatory Background

1. FERC exercises "general regulatory jurisdiction" over all of Storage Company's and Pipeline Company's rates, services, facilities and operations. Pet. App. B6; see Pet. App. A5; J.A. 66, 75. FERC's regulation of "natural gas companies," such as Pipeline Company and Storage Company, is based upon FERC's statutory authority (1) to issue "certificates of public convenience and necessity"; and (2) to determine the rates to be charged by natural gas companies in "connection with any transportation or sale of natural gas." See 15 U.S.C. § 717d; 15 U.S.C. § 717f. FERC's authority to determine rates and to issue certificates of public convenience and necessity constitutes "[t]he heart of the [Natural Gas] Act." *Atlantic Refining Co.* v. *Public Service Comm'n*, 360 U.S. 378, 388 (1959).

Under 15 U.S.C. § 717f(c)(1)(A), a natural gas company must obtain a "certificate of public convenience and necessity" before constructing, expanding, acquiring or operating any facility involved in the transportation or

sale of natural gas in interstate commerce. Pursuant to its statutory authority,[5] FERC has promulgated extensive regulations governing the procedures for the issuance of a certificate. 18 C.F.R. Part 157, Subpart A. The regulations list in detail the information that must be provided for FERC's consideration in determining whether, and under what circumstances, to issue a certificate. 18 C.F.R. § 157.14. The information required includes a specific statement of "plans for financing the proposed facilities" and a description of any proposed securities issuances, including the amount, terms and conditions, interest or dividends, expenses, date of issuance, manner of issuance, manner of extinguishment of the obligation and other relevant information. *Id.* Thus, although FERC does not have general securities regulatory authority over natural gas companies, its regulations give it the authority, in passing on Section 7 certificate applications, to determine the adequacy of the applicant company's financing, including the ratio of debt to equity. Based upon the information supplied in the application, FERC may issue or deny the certificate or may condition the issuance of the certificate on the company's compliance with "such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e).

Under 15 U.S.C. § 717d(a), FERC is authorized to determine the "just and reasonable rate" to be charged by any natural gas company "in connection with any transportation or sale of natural gas." In setting a reasonable rate of return, FERC "considers the applicable capital structure (the percentages of debt, preferred stock, and common stock) and the rate of return each

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[5] 15 U.S.C. § 717f(d) provides that:

> [a]pplication for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form [and] contain such information . . . as the Commission shall, by regulation, require.

form of capital is permitted to earn." *Public Service Comm'n of New York* v. *FERC*, 813 F.2d 448, 458 (D.C. Cir. 1987). "The overall rate of return is determined by computing an average of the three separate rates of return, weighted by the relative amounts of each type of capital." *Id.*

The "capital structure" of a natural gas company reflects the type and amount of securities—debt and/or equity—it has outstanding at any given point in time. More specifically, "capital structure" refers to how much of the company's capital has come from debt and how much from equity (stock, investments). While FERC does not directly "approve" a company's securities issuances, the reasonableness of each and every securities issuance by a natural gas company is reviewed by FERC in the course of setting just and reasonable rates for that company.[6] A natural gas company's debt/equity ratio has a direct effect on its rates. This is so because the costs of debt and equity are usually different. FERC thus has authority as part of its ratemaking function to respond to overcapitalization and overleveraging by a natural gas company.[7]

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[6] FERC has expressed a "general policy of using actual capital structures"—rather than imputing a hypothetical capital structure—for purposes of ratemaking. *Arkansas Louisiana Gas Company*, 31 FERC ¶ 61,318 (1985) at 61,729. Nevertheless, there are situations where FERC will "impute" a capital structure to a company. For example, "[w]hen an equity ratio moves beyond generally accepted limits" FERC will impute a "reasonable" ratio based upon averages in the industry. *Alabama-Tennessee Natural Gas Company*, 38 FERC ¶ 61,251 (1987) at 61,849-850.

[7] The terms "overcapitalization" and "overleveraging" generally refer to the situation where a company's capital structure is perceived to have either too much equity or too much debt. In addition, the Michigan Supreme Court has recently explained that Act 144 "protects against 'over-capitalization' . . . by determining that the amount of [the utility's] capital stock and bonds . . . correlate[s] with the amount and value of its property." *Kelley* v. *MPSC*, 412 Mich. 385, 316 N.W.2d 187, 193 (1982).

2. The Michigan Utilities Securities Act ("Act 144") is a component of Michigan's comprehensive statutory scheme for the regulation of public utilities in the State.[8] Mich. Comp. Laws §§ 460.301, *et seq.* Act 144 requires any public utility—including any company "engaged in the business of piping or transporting natural gas for public use, directly or indirectly"—to obtain the approval of the MPSC before issuing long-term[9] securities. *Id.*: Pet. App. A1, A4, B8-B9. The Act applies regardless of whether the securities will be sold in Michigan or whether any proceeds of the sale will be used to finance operations or new construction in Michigan.

Upon receipt of a written application for permission to issue securities, the MPSC may, at its discretion, "hold hearings, and examine witnesses, books, papers, documents or contracts" the commission considers necessary to enable it to reach a determination. Mich. Comp. Laws § 460.301(2). The MPSC also may direct an "appraisal of the property of the applicant" made at the expense of the applicant. *Id.* There are no statutory limits on the time within which the MPSC must conduct its inquiry.

The statutory purpose of MPSC approval is to determine (1) whether the securities "are to be applied to lawful purposes" and whether the "issue and amount is

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[8] Section 460.301 is part of Chapter 460 of the Michigan Code which establishes the duties of the MPSC in regulating public utilities. *See* Mich. Comp. Laws § 460.1, *et seq.* (creation of public service commission). The other sections of Chapter 460 provide the MPSC authority to "regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of such public utilities." Section 460.6. Other provisions of Chapter 460 deal with common carrier regulation, Section 460.6-460.6a, regulation of "carriers by water," Section 460.201, regulation of transmission of electricity, Section 460.551, and the issuance of certificates of convenience and necessity, Section 460.501.

[9] Section 460.301(4) exempts short term notes "payable at periods of not more than 24 months . . . ." Mich. Comp. Laws § 460.301(4).

essential to the successful carrying out of the purposes" of the applicant or (2) whether "the issue . . . fairly represents accumulated and undistributed earnings . . . ." Mich. Comp. Laws § 460.301(3). As petitioners concede, proceedings under Act 144 involve a "review of the financial decisions of the utility" to determine whether issuance of the securities in question would result in "overleveraging" or "overcapitalization." Pet. Br. at 31-32; see Pet. App. B11-B12.

The MPSC is concerned with "overleveraging" and "overcapitalization" because, as previously noted, capital structure has a direct bearing on the level of a utility's rates.[10] See *Michigan Gas Storage Co.* v. *MPSC*, 405 Mich. 376, 275 N.W.2d 457, 462 (1979) (Act 144 "serves the interest of the ratepayers in assuring . . . service at reasonable rates"); *Indiana and Michigan Power Co.* v. *Michigan*, 405 Mich. 400, 275 N.W.2d 450, 453 (1979) ("capital structure . . . is an essential element in [a company's] rate structure").

In addition to influencing the rates that local utilities will pay for natural gas, Act 144 is also designed to ensure that "inadequate financing" will not lead to the

[10] Through the approval process of Act 144, the MPSC has the authority to control the amounts of new debt and equity issued by a company and thereby control its capital structure, which in turn "has a direct bearing on the rates set . . . ." *Kelley* v. *MPSC*, 412 Mich. 385, 316 N.W.2d 187, 193 (1982).

For example, given a hypothetical company with net investment (or "rate base") of $100, a cost of common equity of 10%, and an embedded debt cost of 8%, the company's annual capital cost will be $9.50 when its debt/equity ratio is 25/75 (i.e., [(0.25 x .08) + (0.75 x .10)] x $100), $9.00 when its debt/equity ratio is 50/50 ([(0.50 x .08) + (0.50 x .10)] x $100), and $10.00 when its debt/equity ratio is 0/100 ([(0.00 x .08) + (1.00 x .10)] x §100). The company's capital cost is computed by multiplying the sum of its costs of debt and equity times its net investment. Thus, with net investment of $100 and a debt/equity ratio of 50/50, the company's debt costs $4.00 (.5 x .08 x $100) and its common equity costs $5.00 (.5 x .10 x $100), for a total capital cost of $9.00.

financial ruin of the company. Pet. App. B11 (quoting *Michigan Gas Storage Co.*, 275 N.W.2d at 462). Act 144 also is intended, through the administrative review of "financing," to prevent a utility or natural gas company from "jeopardizing" the "physical property of a company within the state, essential to the company's ultimate service to the public." *Id.* Thus, by providing local reviews of the "financial decisions" of "natural gas companies," Act 144 is designed to "prevent unlawful securities, overleveraging and other evils of overcapitalization, all of which would directly affect the local populace served by respondents' facilities." Pet. Br. 31-32.[11]

Petitioners' repeated reference to Act 144 as a "securities regulation" is misleading because the purpose and operation of Act 144 is only tangentially related to "securities" *per se*. Michigan has a separate statute, the Michigan Uniform Securities Act,[12] which serves the tradi-

[11] Act 144 also provides the MPSC with leverage to use in negotiations on issues unrelated to the securities themselves. The district court found that despite the absence of "broad regulatory authority," the "MPSC can still exert influence over Pipeline Company and Storage Company, if it has the right to regulate and control securities issuances by such companies." J.A. 60. For example, the record shows that in October 1980, an application for approval of securities was withdrawn by Storage Company after MPSC advised that hearings would be held on the application. Thereafter, in October 1981, "after a settlement had been reached with the MPSC regarding ANR's divestiture of MCGC, Storage Company filed a substitute application" which was approved. J.A. 40, 75. *See infra* pp. 46-47.

[12] The Michigan Uniform Securities Act is very similar to the Uniform Securities Act of 1956, 7B U.L.A. 509 *et seq.* This model law has been substantially adopted in 35 states, the District of Columbia, and Puerto Rico. States which have not adopted the Uniform Securities Act have enacted their own blue sky laws. *See, e.g.*, New York Consolidated Laws, General Business Law—Ch. 20, Art. 23-a; California Corporations Code, Sec. 25000 *et seq.* *See also* Securities Act of 1933, 15 U.S.C. § 77a *et seq.*; Securities Exchange Act of 1934, 15 U.S.C. § 78 *et seq.*

The Michigan Uniform Securities Act exempts the securities of certain public utilities from its registration and prospectus require-

tional purpose of state securities or "blue sky" regulation in protecting Michigan investors from deceptive or fraudulent sales of securities within the state. Mich. Stat. Ann. §§ 19.776 (101), *et seq.*; see *People* v. *Dempster*, 396 Mich. 700, 242 N.W.2d 381, 384 (1976). In addition to the state blue sky laws, investors are protected nationally by federal securities acts, which apply to all securities issuances by respondents.[13] By contrast, Act 144 is a means of controlling the basic financial decisions of public utilities.

C. Decisions Below

Pipeline and Storage Companies filed this suit in the United States District Court for the Western District of Michigan against petitioners, in their official capacities. The complaint sought a declaratory judgment that Act 144 was unconstitutional under the Supremacy Clause and the Commerce Clause of the United States Constitution, as applied to the exclusively interstate businesses of Pipeline and Storage Companies.

Following discovery, the parties stipulated to the essential facts and the district court entered its opinion

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ments. M.C.L.A. § 451.802(a)(6). The Act's other provisions apply to the securities of respondents. These provisions include, for example, the broad anti-fraud provisions, M.C.L.A. § 451.501. *See* 7B U.L.A. 516 (official comment of conference of Commissioners on Uniform State Laws).

[13] Petitioners argue that federal securities laws "preserve state regulation of securities." Pet. Br. at 20. However, because the Michigan Uniform Securities Act—not Act 144—is the state's counterpart to these federal securities laws, the point is irrelevant. Even if Act 144 were a true securities regulation, the non-preemption language in the federal securities laws would not save it. This language does not protect state securities statutes from all preemption by federal law; it simply provides that nothing *in the securities statutes* will be deemed to preempt state securities regulation. 15 U.S.C. § 77r ("Nothing in this title shall affect the jurisdiction of the securities commission . . . of any State or Territory of the United States . . . .").

based upon the written record. Pet. App. B2-B3. Although the district court found that FERC "exercise[d] general regulatory jurisdiction" over Pipeline and Storage Companies (Pet. App. B-6), it concluded that the Natural Gas Act evinced no "Congressional intent to occupy the entire field of utilities securities transactions." Pet. App. B-10. In addition, the district court found no actual conflict between Michigan's preissuance review of securities and FERC's review of financial decisions under Section 7 of the Natural Gas Act. Pet. App. B15-B16.

With respect to the Commerce Clause, the district court applied the "balancing test" of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). The court held that the public interest in avoiding a financial failure of either Storage Company or Pipeline Company due to overcapitalization outweighed the "relatively limited" burden of Act 144 on interstate commerce. Pet. App. B19.

The court of appeals reversed both the Supremacy Clause and Commerce Clause holdings. The court held first that Congress, through the creation of a "comprehensive" national gas policy governing interstate transportation and sale, implicitly preempted Act 144. Pet. App. A11.[14] The court further held that Act 144 "conflicts with federal regulation." Pet. App. A16. As an example of the "imminent possibility" of conflict, the court noted that FERC might well approve a large expenditure of capital "to build a $1 billion pipeline to Maine because the Northeast needs additional supplies of natural gas . . . ." but the MPSC might refuse to approve the issuance of such securities to avoid any increased cost to Michigan consumers. Pet. App. A16.

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[14] Although the Natural Gas Act does not specifically provide for FERC "approval" of securities issuances, the court noted that the Section 7 certificate process provides for implicit review of financing. Pet. App. A14-15.

With respect to the Commerce Clause, the court noted that the burdens on interstate commerce "far outweigh the benefits, if any, of Michigan's interests in protecting consumers and investors." Pet. App. A20-A21. Indeed, the court found that the alleged benefits of Act 144 "do not further important state interests" because the state interests—preventing "overcapitalization," maintaining "financial integrity," and ensuring "reasonable rates"—are fully protected under the federal regulatory scheme.

SUMMARY OF ARGUMENT

I.

A. Act 144 is preempted by the Natural Gas Act of 1938. In that statute Congress occupied the field of "all matters relating" to the interstate sale and transportation of natural gas. 15 U.S.C. § 717(a); *Panhandle Eastern Pipe Line Co.* v. *Indiana Public Service Comm'n*, 322 U.S. 507 (1947). Thus, Congress granted plenary authority to the FPC (now FERC) to regulate those activities of natural gas companies which were beyond the authority of the states to regulate by this Court's interpretation of the Commerce Clause as of 1938. See *Public Utilities Comm'n of Rhode Island* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). Securities issuances used to finance the interstate sale and transportation of natural gas were clearly beyond the power of the states to control in 1938 and therefore Act 144 falls squarely within the field preempted by Congress in the Natural Gas Act.

B. Act 144 is also preempted because, at the end of the day, it is nothing more than an attempt to regulate rates. And the rates it attempts to regulate are unarguably outside its jurisdiction.

Despite petitioners' characterization of Act 144, it is not a securities statute in the usual sense. Traditional blue sky laws, including Michigan's, and federal securities laws are designed to protect investors by promoting

disclosure and combatting fraudulent practices. Act 144, by contrast, involves regulation of the underlying business justification for, and financing of, a particular transaction rather than regulation of the securities themselves. As definitively construed by the Michigan Supreme Court, the Act is intended to regulate rates in order to protect ratepayers within the state. See, *e.g.*, *Michigan Gas Storage Co.* v. *MPSC*, 405 Mich. 376, 275 N.W.2d 457 (1979).

Respondents' businesses consist solely of wholesale sales and transportation of natural gas in interstate commerce, and therefore their rates are subject to exclusive federal regulation. This Court has held that the Natural Gas Act preempts state attempts indirectly to regulate rates, as Act 144 does. See, *e.g.*, *Transcontinental Gas Pipe Line Corp.* v. *State Oil and Gas Board*, 106 S. Ct. 709 (1986); *Northern Natural Gas Co.* v. *State Corporation Comm'n*, 372 U.S. 84 (1963).

C. Act 144 is also preempted by FERC regulations for issuing certificates of convenience and necessity under Section 7 of the NGA. The legislative history of that provision makes clear that it was Congress' intent that the Commission would scrutinize an applicant's financial condition in making any certification decision.

Consistent with Congress' intent, FERC has adopted regulations implementing Section 7 which require Section 7 applicants to submit detailed financing plans for proposed projects. These plans include extensive information about securities. Pursuant to these regulations, the Commission has frequently conditioned certification upon the formulation of an adequate financing plan. Such regulations are a reasonable interpretation of Section 7, and therefore are valid under this Court's consistent line of cases holding that deference must be given to the Executive Branch and administrative agencies in interpreting the statutes they administer. *Udall* v. *Tallman*, 380 U.S. 1 (1965).

The legislative history of the NGA provides no support for petitioners' contention that the power to scrutinize securities lies outside FERC's lawful authority. The Commission's failure to obtain from Congress increased authority to review securities in no way detracts from the substantial power which it has always possessed. To the extent that congressional intent can be gleaned from inaction, Congress appears to have believed that pre-issuance review would be unduly burdensome and that the public interest is adequately served by scrutiny of securities pursuant to the ratemaking and certification process. The decision to grant the Commission some, but not all, of the regulatory power it desired represents a considered balance of opposing interests, a balance which Michigan may not lawfully alter. *Transcontinental Gas Pipe Line Corp.* v. *State Oil and Gas Board*, 106 S. Ct. at 717.

D. Finally, Act 144 is preempted because there exists an "imminent possibility" of conflict between the Act and the NGA. *Maryland* v. *Louisiana*, 451 U.S. 725, 748 (1981). Most obviously, conflict is imminent because Michigan asserts the right to deny authorization to issue securities even when the FERC has determined that the securities furnish an adequate basis for a project which serves the public convenience and necessity. Moreover, a federal program designed to ensure equitable rates and an adequate supply of natural gas to purchasers nationwide is inherently in conflict with Michigan's law, which is designed to advance the state's interests in protecting local ratepayers and local consumers.

II.

A. The court of appeals correctly held that Act 144 violates the Commerce Clause because it unduly burdens interstate commerce. First, the Act is *per se* invalid; it purports to regulate directly interstate commerce. *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 106 S. Ct. 2080 (1986). Michigan asserts a

veto power over *all* securities issued by natural gas companies doing any business within its borders, even when the securities will not be sold in Michigan and the project to be financed will lie wholly outside the State. A state law "forcing a merchant to seek regulatory authority approval in one State before undertaking a transaction in another" is *per se* invalid under the Commerce Clause. *Id.* at 2086.

B. Act 144 is also unconstitutional under the balancing test set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). Here, Michigan has attempted to regulate in an area with a pervasive national interest in uniformity, yet Act 144 furthers no state interests which can justify the burden on interstate commerce. The interests of ratepayers nationwide are fully protected by FERC regulation, and Michigan can assert no legitimate interest in advantaging its own ratepayers at the expense of those in other states. The interests of Michigan's investors are also safeguarded in the first instance by federal securities regulation.

In short, Michigan's interest in protecting its investors can be accomplished through its blue sky laws or through federal securities laws. Its interest in protecting ratepayers is invalid, because the only rates charged by Pipeline Company and Storage Company are outside the MPSC's ratemaking authority.

The burdens imposed by Act 144 on interstate commerce are considerable. As the court of appeals explained, Michigan's refusal to approve securities issuances can imperil projects in other states. Moreover, even if approval is ultimately granted, the delay involved may increase the costs of financing, resulting in harm to ratepayers throughout the country.

Finally, there are less burdensome means by which Michigan can protect the interests of its own ratepayers. For instance, the Natural Gas Act provides numerous avenues by which state commissions may initiate and

participate in FERC proceedings. Accordingly, under the balancing test in *Pike*, Act 144 violates the Commerce Clause.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT MICHIGAN ACT 144 AS APPLIED TO NATURAL GAS COMPANIES ENGAGED EXCLUSIVELY IN INTERSTATE COMMERCE IS PREEMPTED BY THE NATURAL GAS ACT AND REGULATIONS OF THE FEDERAL ENERGY REGULATORY COMMISSION

Under the preemption doctrine, which is rooted in the Supremacy Clause of the United States Constitution, this Court consistently has held that federal preemption of state law is warranted "whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982).[15] When Congress intends a matter to be controlled exclusively by federal law, it is said to "preempt the field." In that situation, "any state law falling within that field is preempted," even if the state law complements federal statutory purposes or standards. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148, 155 (1942).

In addition, preemption is required whenever state law actually conflicts with federal law.[16] In determining

[15] *See Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 204 (1983); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[16] *See, e.g., Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. at 153; *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963); *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 773 (1947); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

whether a "conflict" between federal and state law exists, the Court has applied two basic tests: (1) whether federal law and state law impose inconsistent duties making compliance with both impossible, see, *e.g.*, *De Canas* v. *Bica*, 424 U.S. 351 (1976); and (2) whether state law stands as an obstacle to the full achievement of Congress' aims. See, *e.g.*, *Michigan Canners & Freezers Ass'n* v. *Agricultural Marketing and Bargaining Board*, 467 U.S. 461 (1984); *Jones* v. *Rath Packing Co.*, 430 U.S. at 526, 540-541.[17]

Both Pipeline Company and Storage Company are natural gas companies engaged exclusively in interstate commerce and subject to comprehensive regulation by FERC under the Natural Gas Act. Based solely on respondents' physical presence within the State of Michigan, and the revenues derived from their FERC-regulated "wholesale" sales and transportation of natural gas in Michigan,[18] petitioners have attempted to regulate the financing decisions and capital structure of respondents through "preissuance" review of the companies' securities offerings. In regulating these decisions,

[17] Legislation by Congress does not exhaust the sources of federal law to which the Supremacy Clause applies. *See Louisiana Public Service Comm'n* v. *FCC*, 106 S. Ct. 1890 (1986). When state law directly conflicts with a federal regulation, the regulation prevails, just as if it were a federal statute. *See Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 698-700 (1984); *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. at 153; *Free* v. *Bland*, 369 U.S. 663, 668 (1962). It is also clear that, within its area of delegated authority, an administrative agency has power similar to Congress' to preempt the field. *See Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. at 698-700; *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. at 154.

[18] Under Mich. Comp. Laws § 460.301, a natural gas company that derives less than 5% of its consolidated gross revenues from "all of its operations . . . in this state, and which does not offer residential natural gas service to the general public . . ." is not subject to "securities" regulation under Act 144.

Michigan stands alone."[19] Petitioners have pointed to no other state which attempts to interfere through preissuance review of securities with FERC's plenary authority over the interstate operations of natural gas companies. See n. 35, *infra*. The court of appeals correctly determined that Michigan's statute is implicitly preempted by, and conflicts with, the Natural Gas Act and federal regulations which implement that Act.

A. Congress Preempted The Field Of Securities Regulation Of Natural Gas Companies By Occupying All Matters Relating To Interstate Natural Gas Operations Which Were Beyond The Power Of The States Under The Commerce Clause In 1938

This Court has held that the Natural Gas Act constitutes a "comprehensive scheme" of "federal regulation of all wholesales of natural gas . . . ." *Northern Natural Gas Co.* v. *State Corporation Comm'n*, 372 U.S. 84, 91 (1963), *quoting Phillips Petroleum Co.* v. *Wisconsin*, 374 U.S. 672, 682 (1954). The "basic purpose" of the Act was to "occupy the field" that the states in 1938 could not constitutionally regulate under this Court's decisions interpreting the Commerce Clause. See *Panhandle Eastern Pipe Line Co.* v. *Indiana Public Service Comm'n*, 332 U.S. 507, 516 (1947); *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 609-610 (1944); H.R. Rep. No. 709, 75th Cong., 1st Sess. 2 (1937).

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[19] The National Association of Regulatory Utility Commissioners, as *amicus curiae* in support of petitioners, states that this case "calls into question the jurisdiction of . . . 41 States to continue utility securities regulation . . . ." NARUC Brief at 3. This statement is patently misleading. The regulation of securities issuances by utilities, which those 41 states undertake, simply is not implicated in this litigation. Instead, respondents challenge the authority of the states to regulate the *wholly interstate operations* of a pervasively federally regulated natural gas company. No party has pointed to a single state—other than Michigan—that has attempted to undertake the type of "securities regulation" that is at issue in this case.

Petitioners correctly observe that Congress intended, in the Natural Gas Act, "to close regulatory gaps." Pet. Br. 15. But the fundamental flaw in their argument is their failure to recognize that (1) Congress intended to "close" the existing gaps not by "strengthening" state regulation (Pet. Br. 15), but by occupying *completely* the field from which the states had been excluded in 1938; and that (2) Act 144, as applied to respondents, regulates activities entirely within the field of matters relating to the transportation and sale for resale of natural gas in interstate commerce, which Congress intended to occupy.

The scope of Congress' preemptive intent is reflected clearly in the statute itself. Congress declared that "Federal regulation in *matters relating to* the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. § 717(a) (emphasis added). Congress thus recognized that any state regulation which related directly to interstate natural gas operations was barred by the Commerce Clause and, therefore, under the NGA, became a matter of exclusive federal concern.

Accordingly, the "field" occupied by the NGA should be defined as all matters relating to interstate gas operations that this Court would have held in 1938 were beyond the states' authority to regulate under the Commerce Clause. That field was defined in a series of cases, decided in the early part of this century, in which the Court construed the Commerce Clause in connection with the interstate sale of energy. R. Pierce, G. Allison & P. Martin, *Economic Regulation: Energy, Transportation and Utilities* 468 (1980). This Court's solution to the difficult balancing of federal and state interests was to "fashion a bright line" between wholesale and retail sales and to declare the "wholesale sale of gas . . . not subject to state regulation . . . ." *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 377 (1983); see *Public Utilities Comm'n of*

Rhode Island v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 90 (1927); *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205, 211-12 (1964); *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U.S. 298, 309 (1924); *Public Utilities Comm'n for Kansas* v. *Landon*, 249 U.S. 236 (1919); *cf. Pennsylvania Gas Co.* v. *Public Service Comm'n of New York*, 252 U.S. 23 (1920).[20]

For example, in *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924), the Court considered whether state utility authorities could lawfully regulate the operations of the Kansas Natural Gas Company. The Kansas Company, like respondents, was engaged in purchasing natural gas in one state and transporting it to another state where it was delivered "to distributing companies, which then sell and deliver it to local consumers." Relying on the wholesale retail distinction derived in earlier cases, the Court held that because the "sale of gas is in wholesale quantities . . . for resale to consumers," the business of the Kansas Company is "wholly interstate." *Id.* at 306.[21] According to the

[20] When it passed the Natural Gas Act, Congress sought to regulate activity which it believed to be beyond the control of the states. This Court has held repeatedly, however, that the Act has preemptive effect. *See Illinois Natural Gas Co.* v. *Central Illinois Public Services Co.*, 314 U.S. 493, 504-507 (1942); *Transcontinental Gas Pipe Line Corp.* v. *State Oil and Gas Board*, 106 S. Ct. 709 (1986); *Northern Natural Gas Co.* v. *State Corporation Commission*, 372 U.S. 84 (1963). Congress clearly manifested its intention to occupy the field of matters relating to wholesale sales and transportation of natural gas. As this Court's prior decisions indicate, that intention must be respected, even though the constitutional framework (the "wholesale/retail distinction") which underlay Congress's choice has changed since the Act's passage. *See, e.g., Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. at 498, 506-507 (the line Congress drew in 1938 remains as the demarcation between state and federal authority unless and until Congress chooses to revisit the issue).

[21] The Court explained that "[w]ith the delivery of the gas to the distributing companies, however, the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation." 265 U.S. at 308.

Court's reasoning, "[t]he transportation, sale and delivery constitute an unbroken chain, fundamentally interstate from beginning to end . . . ." The paramount interest in this interstate process "is not local but national, admitting of and requiring uniformity of regulation . . . even though it be the uniformity of governmental nonaction . . . ." *Id.* at 309-310.

Pipeline Company and Storage Company are natural gas companies engaged solely in the interstate transportation, storage and sale for resale of natural gas. There can be no question that securities issued by a natural gas company that operates exclusively in interstate commerce is a "matter relating to" the transportation and sale of gas in interstate commerce. See 15 U.S.C. § 717(a). None of respondents' interstate business, including the securities issuances which support their interstate systems, would have been subject constitutionally to economic regulation by the states in 1938. Therefore, none of their business was intended by Congress in that same year to be left to state regulation. Accordingly, the issuance of securities by respondents is within the field of *exclusive* federal authority established by Congress in the Natural Gas Act and beyond the authority of petitioners to regulate under Act 144.

B. Act 144 Is Preempted By Section 4 Of The Natural Gas Act Because It Interferes With FERC's Control Of A Natural Gas Company's Capital Structure, Which Is Central To FERC's Ratemaking Authority

Even if Congress did not intend to preempt all state laws in connection with the regulation of interstate gas operations which exceeded the states' power under the Commerce Clause as interpreted by this Court prior to 1938, it clearly intended to preempt the field of ratemaking for interstate sales and transportation of natural gas.

15 U.S.C. § 717c; *FPC* v. *Hope Natural Gas Co.*, 320 U.S. at 609-610 (1944); H.R. Rep. No. 709, 75th Cong., 1st Sess. 2 (1937). By permitting Michigan to make decisions concerning securities—the cost and amount of which are at the core of the ratemaking process—Act 144 interferes with a process committed exclusively to FERC's authority. See *Transcontinental Gas Pipe Line Corp.* v. *State Oil and Gas Board*, 106 S. Ct. 709 (1986); *Northern Natural Gas Co.* v. *State Corporation Comm'n*, 372 U.S. 84 (1963). Specifically, Act 144, as authoritatively construed by the Michigan Supreme Court, has as its central purpose the maintenance of "reasonable rates" for Michigan ratepayers. *Michigan Gas Storage, supra; Indiana and Michigan Power Co., supra.* Act 144 accomplishes this purpose by allowing the state regulators to exercise control over the *capital structures* of natural gas companies—a matter which Congress committed to FERC's plenary control.

It is axiomatic that in setting rates, FERC, or any other entity attempting to fix rates, must consider the "capital costs" of the business—including the cost of equity and debt, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. at 603—in order to determine a reasonable return on capital invested in the enterprise. In its consideration of capital costs, FERC routinely reviews capital structure in pipeline rate cases under Section 4 of the Natural Gas Act. See, *e.g.*, *Public Service Commission* v. *Federal Energy Regulatory Commission*, 813 F.2d 448, 458-62 (D.C. Cir. 1987), *aff'g*, *Tennessee Gas Pipeline Co*, 32 FERC ¶ 61,086, 61,223 (1985), *reh'g denied*, 33 FERC ¶ 61,005, 61,008 (1985); *Arkansas Louisiana Gas Co., a Division of Arkla, Inc.*, 31 FERC ¶ 61,318, 61,725-29 (1985); *Consolidated Gas Supply Corp.*, 24 FERC ¶ 61,046, 61,133-41 (1983), *reh'g denied*, 24 FERC ¶ 61,283, 61,582-83 (1983); *Kansas-Nebraska Natural Gas Co.*, 9 FERC ¶ 61,150, 61,300 (1979); *North Penn Gas Co.*, 59 FPC 2375, 2378 (1977); *Transwestern Pipeline Co.*, 59 FPC 797, 799-800 (1977). In such review, the Commission may decide that the capital structure of a company is inappropriate, or, in the words of the Michigan Supreme Court, that the company is "overleveraged" or "overcapitalized," *i.e.*, it has too much debt or equity. In that event, it sets rates by imputing a capital structure to the company. See, *e.g.*, *Alabama-Tennessee Natural Gas Co.*, 38 FERC ¶ 61,251, 61,848-50 (1987) (hypothetical capital structure of 45 percent equity, 55 percent debt used to set rates where actual capital structure was 95.78 percent equity); *Kentucky West Virginia Gas Co.*, 2 FERC ¶ 61,139, 61,325-28 (1978) (parent company's capital structure with 44.5 percent common equity, 52 percent debt, and 3.5 percent preferred stock imputed to wholly-owned gas pipeline subsidiary with capital structure of 100 percent equity).

This Court in *Northern Natural Gas* held that the Natural Gas Act's provisions concerning ratemaking confer upon FERC "paramount and exclusive" authority "to regulate the intricate relationship between the [interstate] purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States." 372 U.S. at 92. Based on this interpretation, the Court concluded that a Kansas regulation that required an interstate natural gas company to prorate its purchases of natural gas within the state was preempted by the need for uniformity in the ratemaking process. Although the regulation in question did not directly affect "prices of interstate wholesales of natural gas," the Court nevertheless concluded that "[t]he federal regulatory scheme leaves no room . . . for state regulations which would *indirectly* achieve the same result." *Id.* at 91 (emphasis added).[22] See *Maryland* v. *Louisiana*, 451

[22] It is not clear precisely how indirect the effects of a state law can be and still be preempted. It may be doubted whether health and safety standards applied to natural gas companies which might affect rates are impermissible under the NGA. *Cf. Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960). But Act 144

U.S. 725, 748 (1981); *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 627-628 (1973).

In 1978, "FERC's comprehensive regulatory scheme involv[ing] 'utility-type ratemaking' control over prices and supplies" of natural gas was amended to "strip FERC of jurisdiction" over first sales of new natural gas to natural gas companies from suppliers. *Transcontinental Gas Pipe Line Corporation* v. *State Oil and Gas Board*, 106 S. Ct. 709, 716 (1986); see 15 U.S.C. §§ 3431(a)(1)(B)(i) and (ii). In *Transcontinental*, this Court held that, despite the congressional withdrawal of FERC authority to regulate natural gas purchases, a Mississippi order that was "virtually identical" to the purchasing restrictions in *Northern Natural Gas* was preempted by Congress' occupation of the field of interstate natural gas regulation. *Transcontinental*, 106 S. Ct. at 716-718.

The Court noted first that Congress' decision to withhold federal authority to regulate a particular aspect of a natural gas company's business "had little to do" with the issue of whether "state regulations that affect a pipeline's costs . . . impermissibly intrude upon federal concerns." *Id.* at 716, *quoting Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983).[23] Thus, although FERC could not directly regulate "first sale" purchases under the Natural Gas Act, any more than it can directly regulate securities issuances under Section 4 of the Natural Gas Act, this Court held that the State's gas purchasing regulations affected the pipeline companies' costs and purchasing patterns and thereby impermissibly intruded into an area of federal concern. *Id.* at 716. Because interstate rates and operations remained subjects of "deep federal concern," state regulations that had an indirect effect on rates were held to be preempted.[24]

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is a direct regulation of the economic activities of natural gas companies just as the pro-rata purchasing order was in *Northern Natural Gas* and *Transcontinental*. It is a direct intrusion into a field occupied by the federal government and is thus preempted.

Amici rely on *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983). *See* Brief of the Council of State Governments, *et al.*, at 17-18. However, the Court's opinion in *Pacific Gas* was based on very explicit language, both on the face of the statute and in the legislative history, which divided regulatory authority over nuclear power plants between the states and the federal government. The federal government was to have sole authority in establishing standards to prevent safety hazards caused by radiation; states expressly retained their power to regulate the industry with regard to economic concerns.

Respondents do not claim that all aspects of their businesses are shielded from state regulation. The state may apply blue sky laws or health and safety regulations to natural gas companies, just as California in *Pacific Gas* could oversee the economic implications of nuclear power generation. Act 144, however, has as its central purpose control over rates--in the instant case, control over interstate rates which Congress committed to exclusive federal regulation. California could not have regulated the safety aspects of nuclear energy, and Michigan may not regulate the rates of respondents.

[23] The Court in *Transcontinental* noted that, under the Natural Gas Act, "when Congress meant to vest . . . authority in the States it did so explicitly." 106 S. Ct. at 717. Congress has not expressly granted the states any authority over securities issued by natural gas companies.

[24] Similarly, in *Exxon Corp.* v. *Eagerton*, 462 U.S. 176 (1983), the Court held that a state statute, which prohibited oil and gas producers from passing on an increase in severance tax to interstate purchasers, was preempted by the NGA as an indirect interference with the FERC's broad authority over interstate sales. Under the same theory, the Court held that Louisiana's "first use" tax, assessed against the owner of the gas at the time of first use within the State, interfered "with the FERC's authority to regulate the determination of the proper allocation of costs associated with the sale of natural gas to consumers." *Maryland* v. *Louisiana*, 451 U.S. at 749. Just as these two statutes unconstitutionally affected the price of gas, the application of Act 144 to respondents can significantly affect the cost of financing and, ultimately, increase the cost of gas to consumers. *See Western Union* v. *PSC*, 127 Mich. App. 88, 95, 338 N.W.2d 731 (1983). But even if the state's ac-

Act 144, like the purchasing restrictions at issue in *Northern Natural Gas* and *Transcontinental*, is a regulatory method of manipulating the "intricate relationship" between a company's capital structure and the prices at which it transports and sells gas in interstate commerce. Indeed, Act 144 more clearly intrudes into the area of exclusive federal rate regulation than the pro-rata purchasing requirements struck down in those cases. Petitioners admit that the state statute, as conclusively interpreted by the Michigan Supreme Court, regulates capital structure in order to protect the interests of Michigan ratepayers in "*reasonable rates.*" Pet. Br. 35, *quoting Michigan Gas Storage*, 275 N.W.2d at 453. This is precisely the type of indirect effect on an area of exclusive federal regulation under the Natural Gas Act that this Court has previously struck down.

C. Act 144 Is Preempted Because Congress Granted FERC Exclusive Control Of Securities Under Section 7 Of The NGA

Act 144's preissuance regulation is also preempted because it intrudes into FERC's authority to regulate securities under Section 7 of the Natural Gas Act. See pp. 4-5, *supra*. There can be no question that FERC currently has authority, which it has exercised, to regulate securities issuances in connection with its certification process under Section 7 of the Natural Gas Act. That provision states that FERC has "the power to attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e).[25] In enacting this

tions ultimately *reduced* the cost of gas to consumers, it would still interfere with FERC's ratemaking authority, which is designed to balance the interests of investors and consumers. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. at 605, 611-16.

[25] Although the Act as originally drafted had required that a certificate of public convenience and necessity be obtained only when a company sought to enter "a market in which natural gas is already being served by another natural-gas company," the Act as finally adopted requires such a certificate for any "transportation or sale of natural gas or the construction, extension, or operation of natural-gas facilities subject to the jurisdiction of the Federal Power Commission." S. Rep. No. 948, 77th Cong., 2d Sess. 1 (1942).

[26] Petitioners assert, without citation, that Section 7 "was only intended to give FERC the authority to prevent uneconomic or otherwise undesirable facilities or extensions from being added onto the interstate natural gas pipeline system." Pet. Br. at 28. This is wholly inconsistent with both the language of the statute and this Court's interpretation of the scope of the FERC's authority. Petitioners are simply wrong in asserting that FERC lacks authority to deny a certificate if the securities whose proceeds would fund the certificated project would leave the corporation overcapitalized.

language Congress intended to confer upon the Commission "jurisdiction to regulate . . . initial financing." H.R. Rep. No. 1290, 77th Cong., 1st Sess. 2 (1941). Thus, FERC was expressly empowered "to scrutinize the financial set-up . . . and the characteristics of the rate structure . . ." (*id.* at 3), and to "examine costs, finances, necessity, feasibility, and adequacy of proposed services." S. Rep. No. 948, 77th Cong., 2d Sess. 2 (1942).

Consistent with the broad grant of authority in Section 7, which this Court has held "requires the Commission to evaluate all factors bearing on the public interest," *Atlantic Refining Co.* v. *Public Service Comm'n*, 360 U.S. 378, 391 (1959),[26] and with the express direction in the legislative history to consider financing, FERC in its regulations requires Section 7 applicants to supply it with information concerning the securities to be issued in connection with any matter to be certificated. 18 C.F.R. § 157.14(a)(14)(i). See 15 U.S.C. § 717f(d), p. 5, *supra*. In addition, FERC has frequently made the formulation of a satisfactory financing plan a prerequisite to the issuance of a certificate. See, *e.g.*, *In the Matter of Trunkline Gas Supply Co.*, 8 FPC 250, 260 (1949) (requiring the applicant "prior to further issuance of any securities" to supply the Commission with "a statement of the bonds, debentures, notes, stock, or other securities

proposed to be issued . . ."); *Great Lakes Gas Transmission Co.*, 37 FPC 1070, 1090 (1967); *Arkansas Louisiana Gas Company*, 47 FPC 583, 586-87 (1972); *Ozark Gas Transmission System*, 16 FERC ¶ 61,099, 61,206 (1981) and 12 FERC ¶ 63,048, 65,176 (1980); *Trailblazer Pipeline Company*, 18 FERC ¶ 61,244, 61,500-504 (1982).[27]

Petitioners assert that FERC does not have power to regulate the securities of natural gas companies because the agency has repeatedly, and unsuccessfully, sought such authority from Congress. But petitioners' argument is undercut by FERC's regulation, under which it exercises authority to inquire into a natural gas company's financing plans. That regulation is squarely consistent with the broad Section 7 authority that allows FERC to condition the issuance of a certificate upon "such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e).

Contrary to petitioners' assertion (Pet. Br. 28), FERC's regulation is a reasonable interpretation of the statute that it administers. Under well-settled holdings of this Court, a regulation is valid if it is reasonable. *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 626-27 (1971); *E. I. duPont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977); *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945). There is no basis to doubt that FERC's regulation is valid under this standard. Because petitioners' argument stands on the premise that FERC lacks the authority to do what its regulation provides, their contention must be rejected. Petitioners' argument also assumes incorrectly that "securities regulation" is a monolithic, indivisible concept—either the agency has it or it does not. This argument wholly ignores the relevant legislative history, which demonstrates that Congress has granted FERC the authority over securities that Congress believed to be sufficient, but rejected giving FERC the kind of extreme authority Michigan seeks to exercise.

The FPC first sought the power of preissuance review in 1949, and the 1950 House subcommittee hearings provide what is still the fullest Congressional consideration of the agency's power over the securities of natural gas companies. *Hearings on H.R. 5306, Subcommittee of House Committee on Interstate and Foreign Commerce*, 81st Cong., 2d Sess. (hereinafter "1950 House Hearings").[28] The FPC's report to Congress asked for powers "substantially similar" to those exercised over the securities of interstate electric utilities under the Federal Power Act ("FPA").[29]

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[27] In 1950 the FPC's Chairman testified before the House of Representatives:

> "We try to explore the financial plan very fully on the record in connection with certificate proceedings; and I want to say, Mr. Beckworth, that under the authority contained in Section 7, the Commission has been able to inquire into, and in certain instances to insert important conditions relative to, financing in connection with the authorization of new construction."

Hearings on H.R. 5306, Subcomm. of House Comm. on Interstate and Foreign Commerce, 81st Cong., 2d Sess. 26 (1950).

[28] Later FPC proposals also sought preissuance review similar to that provided by H.R. 5306. *See* S. 1880, Sec. 3, 84th Cong., 1st Sess. (1955). *See also* 44 FPC Ann. Rep. 7 (1964) ("the proposal would be comparable to section 204 of the Federal Power Act").

[29] Section 204(f) of the FPA, 16 U.S.C. § 824c(f), gives a broad exemption to electric utilities already subject to state regulation. H.R. 5306 would have given a much narrower exemption, one which would not apply to respondents in the present case. *See* 1950 House Hearings at 5.

Petitioners emphasize the difference between the authority of the FERC over electric utilities and natural gas companies. But the legislative history clearly shows that the differences between the two statutes explain why authority similar to Section 204(f) was never conferred upon FERC in regulating natural gas companies. Section 204 regulation under the FPA is necessary because FERC has no certification authority over the construction of facilities incident to the sale and transmission of electric power in interstate commerce similar to that exercised under Section 7 of the NGA. *See* 1950 House Hearings at 26, 27, 67; *Hearings on*

The FPC's proposal was defeated in Committee, and thus the hearings held in connection with that proposed legislation provide the most authoritative explanation of Congress' intent.[30] The primary opponent of the proposed legislation was the Independent Natural Gas Association ("INGA"), which opposed the legislation as "not needed" "[b]ecause of the adequacy of existing Federal regulation." 1950 House Hearings at 52. INGA observed first that there is "no recorded instance where the capital structure or financing of a natural-gas company has been proved to be detrimental to investors or con-

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S. 1880, Senate Committee on Interstate and Foreign Commerce, 84th Cong., 1st Sess. (1955) at 1697-98. Thus, the difference in FERC's regulatory authority over securities of electric utilities and natural gas companies merely reflects a difference in the other regulatory powers of FERC, and not any intent to preclude FERC from scrutinizing securities issuances of natural gas companies.

Both petitioners and *amici* also stress FPA § 204(f), 16 U.S.C. § 824c(f), which preserves state regulatory authority over the securities of electric utilities. Pet. Br. at 19-20; CSG Br. at 23-25. The analogy fails because of the essential differences between electric utilities and natural gas companies: "The typical electric utility operates within one State or a few contiguous States in a regional set-up. In the natural-gas field, on the other hand, the picture is dominated by the great long-distance transmission systems, which are engaged primarily in transporting gas from the concentrated areas of heavy production in the Southwest for wholesale sale to local distributors in distant consumer markets." 1950 House Hearings at 24 (Statement of FPC Chairman Smith).

[30] Respondents recognize that ordinarily inaction by Congress is a poor guide to congressional intent. *See, e.g., Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 n.11 (1969). Nevertheless, petitioners and their *amici* stressed the importance of Congress' decision not to expand FERC authority to conduct preissuance securities review in 1950 and 1955. Pet. Br. 25-27; CSG Br. 13.

Similarly, statements by individual witnesses generally are not dispositive in determining Congressional intent. However, this Court has in the past found guidance from such statements in construing the Natural Gas Act. *See, e.g., Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1, 10 n.7, 17-18 (1961); *Panhandle Eastern Pipeline Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 515 n.11, 518 n.14 (1947).

sumers." 1950 House Hearings at 52. The INGA spokesman then argued that, if a problem should arise, the FPC's existing Section 7 authority was a sufficiently "broad and complete exercise of jurisdiction and control over the issuance of securities" to respond to the problem. *Id.* at 53.[31] The INGA spokesman's opposition to the preissuance review proposal was based on his conviction that "[t]his broad and unbridled administrative power to determine what is 'proper' or what is 'compatible' with the public interest could be used actually to impair the ability of such a company to perform its proper public service obligations." *Id.* at 52.

In rejecting the legislation in the face of these arguments, it is quite clear that, far from supporting petitioners' position, Congress' intent to reject additional securities regulation of natural gas companies as unnecessary and burdensome undermine petitioners' argument. Direct federal regulation of natural gas companies' securities involves a weighing of interests: the public interest in thorough supervision of the industry must be balanced against the companies' desire for business autonomy and freedom from administrative burdens. The court of appeals was correct: Congress' rejection of the FPC's proposal does not represent a decision to eschew securities regulation. It simply represents a decision to strike the regulatory balance in one way rather than another. Because Act 144 represents an attempt to alter the balance which Congress has fashioned, the state law is preempted. *Cf. Transcontinental Gas Pipe Line Corp.* v. *State Oil and Gas Board*, 106 S. Ct. at 717; *Lodge 76, Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 144 (1976).

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[31] When a natural gas company is engaged both in interstate "wholesale" sales and in retail sales to consumers, it is difficult to divide the facilities used for retail distribution from those used for wholesale sales, and any financing may serve to finance both retail and wholesale operations. Although respondents would suggest that *any* financing for wholesale operations must be regulated exclusively by FERC, the Court need not address this "mixed use" issue because all of respondents' sales are sales for resale.

The language of Section 7, its administration by FERC and Congress' understanding of the scope of that section clearly show that securities regulation is unquestionably a part of FERC's regulatory authority.[32] Given Congress' intent to make federal regulation of natural gas companies exclusive, FERC's regulation of securities is clearly part of the field Congress intended to occupy when it enacted the Natural Gas Act.[33] Because Act 144 directly invades that field, it is preempted. Compare *Natural Gas Pipe Line Co.* v. *Illinois Commerce Comm'n*, 33 Ill. 2d 214, 210 N.E.2d 490, 494 (1965).

D. Act 144 Conflicts With The Natural Gas Act As Administered By FERC

Although respondents interpret this Court's preemption decisions under the Natural Gas Act as involving implied preemption of the field, these cases also can be analyzed in terms of a conflict between state law and the Natural Gas Act. In striking down both the "first use" tax in Louisiana and the pro-rata purchasing orders in Mississippi and Kansas, the Court held that preemption was necessary because of an "'imminent possibility of collision'" with the purposes of the Natural Gas Act.

[32] Since FERC possesses the authority to regulate securities as necessary to fulfill its Section 7 obligations, *amici*'s reliance on *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375 (1983), is misplaced. CSG Br. at 16. The Court in *Arkansas Electric* expressly premised its holding on the FPC's determination that it did not have jurisdiction over the matter at issue: "Were FERC or the courts ever definitely to . . . decide that the FPC did have jurisdiction, we would obviously be faced with a very different preemption question." 461 U.S. at 383 n.7.

[33] Whether the State's "concerns" are broader than or different from FERC's (CSG Br. 15) is totally irrelevant under a preemption of the field analysis. Even if the State's purposes fully complement FERC's, the state law is preempted. *See* p. 10, *supra*. In fact, even though the court of appeals held that the state's scheme severely interferes with FERC's regulatory authority, *see* pp. 33-34, *infra*, that kind of regulatory conflict is not necessary under the doctrine of preemption of the field.

Maryland v. *Louisiana*, 451 U.S. at 751; *Northern Natural Gas Co.* v. *State Corporation Comm'n*, 372 U.S. at 92. Thus, the Court seems to have held that even an "imminent possibility of collision" is sufficient to create "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the Natural Gas Act. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Much of what we have argued previously to show implied preemption also supports a finding of an imminent possibility of conflict. Thus, state review of securities issuances threatens to interfere with wholesale rates and to increase costs to gas consumers. In addition, any denial of authority to issue securities in connection with a FERC-approved project under Section 7 of the NGA involves a real interference with the federal regulatory regime. But even more fundamentally, there is an inherent tension between Act 144 and the Natural Gas Act because Act 144 is designed to protect *Michigan's* consumers, investors and ratepayers while the NGA's "fundamental purpose . . . is to assure an adequate and reliable supply of gas at reasonable prices" on a *nationwide* basis. *California* v. *Southland Royalty Co.*, 436 U.S. 519, 523 (1978). As the court of appeals explained:

> "A direct conflict between FERC and MPSC could easily occur where FERC, acting in the national interest, authorizes the construction of facilities in a state other than Michigan, requiring the issuance of additional securities, and MPSC, acting in a perceived local interest, refuses to approve the issuance of securities."

Pet. App. A16.

The fact that this precise situation has not yet occurred is no reason to ignore the obvious likelihood of a conflict, especially in light of this Court's prior decisions under the NGA. Unless Act 144 is a dead letter, it eventually will be used to block securities—and when that happens, the consequence will be a direct interference with FERC's authority over respondents' capital

structures or FERC's approval of the financing of a particular project or both. These conflicts are clearly impermissible under the Supremacy Clause and their imminent possibility requires Act 144 to be struck down under the cases interpreting the preemptive effect of the Natural Gas Act.

Act 144 also directly conflicts with Congress' intent in refusing to expand FERC's power to exercise preissuance review similar to that under the Michigan statute. As explained previously, the opposition to the FPC's proposed expansion of its regulatory authority over securities was based in significant part on the absence of any demonstrated need for such review coupled with the burden that this review would impose upon natural gas companies. See 30-31, *supra*. By expressly refusing to allow FERC to impose the burdens of direct preissuance review, Congress clearly did not intend to allow the states to burden natural gas companies in the same way. To the contrary, Congress intended not to allow any direct preissuance securities review. Michigan's application of Act 144 to respondents directly conflicts with Congress' purpose in rejecting those proposed amendments. Accordingly, Act 144 not only is implicitly preempted by, but also directly conflicts with, the Natural Gas Act as administered by FERC.

E. Petitioners Have Failed To Show That Congress Intended To Allow The States To Regulate The Business Practices Of Natural Gas Companies That Do No Intrastate Business

Petitioners and their *amici* offer several arguments in an attempt to avoid the conclusion that Congress preempted Act 144. Petitioners argue first that, unless "Congress expressly assumed an area of regulation" under the NGA, the Court should not find any intent to preempt. Pet. Br. 16.[34] This plainly is incorrect: the

[34] *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507 (1947), relied upon by petitioners for the proposition that Congress did not intend to "occupy the field of natural gas regulation" (Pet. Br. 16), held only that Congress did not intend to preempt the field of "retail" natural gas sales to final consumers. *Id.* at 508-09, 519. With respect to the regulation of natural gas companies, such as respondents, which are engaged solely in "transportation" and "sale for resale" of natural gas in interstate commerce, *Panhandle* clearly holds that Congress *did* intend to occupy the field. *Id.* at 516, 519.

"comprehensive scheme of federal regulation" under the Natural Gas Act "leaves no room" for state regulation that directly or indirectly regulates any area governed by the Natural Gas Act. Petitioners' argument is completely inconsistent with *Transcontinental*, 106 S. Ct. at 715-16 and *Northern Gas Company*, 372 U.S. at 91-93.[35]

[35] The Council of State Governments, *et al.*, argue as *amici curiae* that in light of the "longstanding state regulation" of the securities issuances of "natural gas companies," Congress should not be deemed to have preempted the state role absent explicit authority. CSG Br. 11-12. This argument is flatly incorrect.

First, states were clearly prohibited from regulating the securities—or any other aspect—of the business of interstate natural gas companies under the interpretation of the Commerce Clause prevailing at the time the Natural Gas Act was enacted. *See* pp. 18-21, *supra*. As long as a company was engaged solely in sales and transportation of natural gas in interstate commerce—as respondents are—regulation of their financing arrangements was clearly beyond the reach of the states. Thus, although the issue never arose, it is clear that the "gap" created by this Court's Commerce Clause decisions extended to preissuance securities regulation and the gap was filled by Sections 4 and 7 of the Natural Gas Act. Congress is plainly under no duty to *explicitly* preempt state activity that Congress believed (correctly) to be beyond the states' constitutional authority.

Second, *amici* cite nothing to indicate that any state, except Michigan, has construed its general law regulating the securities of local utilities companies to apply to a "natural gas company" engaged solely in interstate commerce. Moreover, some of the statutes cited by *amici* disclaim such an interpretation. For example, the Arkansas statute, like the Michigan statute, regulates the sale of "public utility" securities, but public utility is narrowly defined as a company "producing, generating, transmitting, delivering or furnishing gas . . . to, or for, the public for compensation," Ark. Stat. Ann. § 73-201, thereby excluding companies like respondent who sell only for "resale." Similarly, the Pennsylvania

Petitioners also argue that, because Act 144 is a "securities regulation" and the language of the Natural Gas Act does not expressly grant FERC the authority to regulate "securities," Act 144 is not within the field of state authority preempted by the Natural Gas Act.[36] See Pet. Br. 17, 23, 29. But the issue of whether Act 144 is within the scope of exclusive federal jurisdiction turns not on how the state characterizes its regulation, but on "whether state regulations . . . impermissibly intrude on federal concerns." See *Transcontinental*, 106 S. Ct. at 716. Congress never expressly regulated pro-rata purchasing by pipelines, but that did not permit Kansas or Mississippi to issue such orders when they indirectly affected the costs incurred by natural gas companies. As discussed, Act 144 is intended to regulate the same "financial decisions" that FERC regulates through its authority to approve interstate rates and to authorize new construction projects through issuance of certificates of public convenience and necessity. Act 144 simply is not a "securities regulation," as that term is commonly used; its purpose and effect is to regulate and control—through approval of debt and equity issuances—the operations, financial decisions and rates of a natural gas company engaged solely in interstate commerce. This Michigan cannot do.[37]

Public Utilities Code provides that "public utilities" require approval before issuing securities, and the Code defines a public utility as a person producing, transmitting or furnishing natural gas "*to the public*." Companies, like respondents, not engaged in distributing such gas directly to the public thereby are excluded. Pa. Stat. Ann. tit. 66, § 102.

[36] For example, with respect to certificates of public convenience and necessity, petitioners argue that FERC regulates "financing" but MPSC reviews "securities issuance." Pet. Br. 31. In light of petitioners' concession that Act 144 is used to review "financial decisions," this is a distinction without a difference.

[37] The decision in *CTS Corp.* v. *Dynamics Corp. of America*, 107 S. Ct. 1637 (1987), where this Court held that the Indiana Control Share Acquisitions law was not preempted by the tender offer provi-

Finally, petitioners argue that Act 144 "fills a gap" left open by Congress. Pet. Br. 21-29. Although petitioners are less than clear[38] in detailing the nature of the "gap" that they perceive, they appear to suggest that a "gap" in the federal regulatory scheme is created because FERC review, in the certification process, is triggered only by construction, extension and operation of new facilities or other specified events. Petitioners therefore suggest that other securities issuances, unassociated with any activity for which a certificate must be sought, will be "unregulated" in the absence of Act 144.

Petitioners are correct that FERC does not exercise general financial oversight of natural gas company se-

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sions of the federal Williams Act, is not to the contrary. First, in *CTS Corp.*, unlike the present case, there was no evidence of any congressional intent to preempt the field in which the state statute operated. The "field" in *CTS Corp.*—general corporate law governing state-chartered corporations—was one traditionally regulated by the states, in contrast to the field of preissuance securities regulation of natural gas companies. Second, in considering whether the state statute conflicted with federal law, the Court found that the Indiana law—which operated within a carefully limited time period—complemented the "basic purpose" of the Williams Act, 'placing investors on an equal footing with the takeover bidder.' *Id.* at 1645-1646 (quotation omitted).

Unlike the Indiana statute in *CTS Corp.*, the Michigan statute at issue here operates within a field that Congress has declared to be exclusively federal. Moreover, Michigan's Act 144 constitutes direct regulation of the same "financial decisions" that FERC must exclusively control in order effectively to exercise its authority over rates and operations of "natural gas companies" in interstate commerce.

[38] Petitioners state simply that FERC regulation of financing, through the certificate process, is "woefully inadequate" without explaining the basis of the perceived inadequacy or the basis for their apparent belief in Act 144's superiority. Pet. Br. 29. There is absolutely no evidence that this so-called "gap" has created any problems in any state, including Michigan. Indeed, it was the complete absence of any evidence of the need for direct securities regulation by the federal government that likely persuaded Congress not to expand FERC's control over securities. *See* page 30, *supra*.

curities on a preissuance review basis. But the lack of day-to-day federal oversight in no way creates a "gap" in FERC's jurisdiction to regulate the financing of natural gas companies. First, FERC regulates precisely what the Michigan Supreme Court has said that Act 144 is intended to regulate—rates. And respondents' rates are all subject to FERC's exclusive jurisdiction. Second, in the certificate process, FERC reviews not only the securities involved in the project under review, but also the overall financial status of the company. There can be no question that FERC's ratemaking function involves a careful inquiry into the reasonableness of a company's issuances of debt and equity securities. See pp. 22-23, *supra*. Moreover, FERC regulations require natural gas companies whose tariff includes a purchased gas adjustment clause—as is the case with virtually the entire industry—to obtain approval of their rates at least every three years, even if no change in rates is requested. 18 C.F.R. § 154.38(d)(4)(vi). Thus, there is no meaningful regulatory gap for Michigan to fill.

Petitioners' other arguments regarding the putative benefits of Act 144 similarly disregard the effect of the pervasive FERC regulatory structure. For example, petitioners suggest that inadequate financing could "jeopardize" a natural gas company's "physical property," thereby threatening a disruption of service in the state. Pet. Br. 35. Aside from the obvious fact that FERC regulation is concerned with preserving the overall financial integrity of a company, no FERC-regulated natural gas company can discontinue any service without first obtaining FERC approval. See 15 U.S.C. § 717f(b).

Similarly, the suggestion that Michigan investors require Act 144 to provide protection from "overcapitalization" by natural gas companies is belied by FERC accounting regulations as set forth in its Uniform System of Accounts. See 18 C.F.R. Part 201. "Overcapitalization" generally refers to a situation where a company's capital stock and bonds do not "correlate with the amount and value of its property" (*i.e.*, where the stock is "watered down"). See *supra* n.7. By establishing a uniform accounting system, in which assets must be recorded at their original cost less depreciation, FERC prevents inflation of a company's asset base and thereby prevents overcapitalization.

Finally, there is simply no reason to assume that a "gap" in federal regulation—even if one existed—in any way implies an invitation to the states to regulate. The question is not whether Congress intended to withhold FERC authority over the preissuance regulation of securities, but whether Congress "intended to give the States the power it had denied FERC." *Transcontinental*, 106 S. Ct. at 717. Petitioners point to no evidence showing that Congress invited the states to undertake financial regulation of interstate natural gas companies through means such as Act 144.[39] This evidence is lacking because Congress clearly preempted this field of regulation.

II. THE COURT BELOW CORRECTLY DETERMINED THAT MICHIGAN'S ACT 144 AS APPLIED TO NATURAL GAS COMPANIES ENGAGED EXCLUSIVELY IN INTERSTATE COMMERCE VIOLATES THE COMMERCE CLAUSE

The Commerce Clause, Article 1, § 8, Cl. 3, grants to Congress the authority "[t]o regulate Commerce . . . among the several States." This affirmative grant of congressional power has long been interpreted as a self-

[39] When a dispute arises as to whether federal or state authority controls in this area, this Court has made clear that "where congressional authority is not explicit we must ask whether state authority can *practicably regulate* a given area and, if we find that it cannot, then we are impelled to find that federal authority governs." *Federal Power Comm'n* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972), *quoting FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19-20 (1961). Regulation of securities issuances of an interstate natural gas company by one or more state regulators—each of whom would "be obliged to regulate in the State, not the national interest"—would lead to the kind of disuniformity that Congress intended to avoid when it authorized plenary federal regulation of natural gas companies. 406 U.S. at 633.

executing limit on state authority to regulate interstate commerce. See *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 84 (1824); *Cooley* v. *Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851).

This Court has adopted a two-level approach to analyzing state economic regulations under the Commerce Clause, depending on the nature of the state law at issue. When a state statute directly regulates out-of-state economic interests or when its effect is to favor in-state economic interests over out-of-state interests, the Court has "generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 106 S. Ct. 2080, 2084 (1986); see *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978); *Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982) (plurality opinion). When a statute has only indirect effects on interstate commerce, the Court will declare the law unconstitutional if the burden on interstate commerce exceeds the benefits the state derives from the statute. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). Michigan's Act 144 is unconstitutional as applied to respondents under both tests.

Preissuance approval of respondents' securities *directly* regulates out-of-state economic interests and interferes with the system-wide financial planning essential to the efficient and reliable provision of services. This direct regulation of respondents' out-of-state activities violates the Commerce Clause regardless of what justification the state proffers in defense of the legislation.[40]

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[40] Petitioners repeatedly emphasize respondents' contacts with the State of Michigan. But these contacts do no more than provide Michigan with the basic authority, consistent with the Due Process Clause, to pass and enforce laws concerning respondents. Thus, Michigan can tax respondents' property and require it to pay its own way for services provided by the state. *R.J. Reynolds Tobacco Co.* v. *Durham County*, 107 S. Ct. 499 (1986). But contacts sufficient to satisfy due process standards do not provide a basis for allowing the state to regulate interstate commerce in a burdensome way.

Moreover, it is clear that the Michigan statute substantially burdens interstate commerce, and therefore is unconstitutional under the standards of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Petitioners have not shown (and cannot show) that Act 144 protects any local interest not already protected fully by the comprehensive federal regulatory scheme—in which the state can and does participate—and by other legitimate state statutes. The only regulatory objective that the petitioners can offer on their side of the balance scale is control over rates. Yet all of respondents' rates are subject to FERC's exclusive jurisdiction. Thus, petitioners' putative interest in regulating "financial decisions" of natural gas companies under Act 144 cannot justify the burden the statute imposes upon interstate commerce. There is no legitimate interest to weigh on the state's side of the balance scale.

A. Act 144 Directly And Deliberately Regulates Commerce in Other States And Therefore Violates The Commerce Clause

There is no "clear line" separating state regulations that are *per se* invalid under the Commerce Clause from those which are subject to the *Bruce Church* balancing test. *Brown-Forman*, 106 S. Ct. at 2084. Instead, the Court's analysis focuses on the practical effect of the statute. *Id.* If the state law "is in reality 'simple economic protectionism,'" *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981), then it is *per se* unconstitutional. Similarly, if the terms of the statute "forc[e] a merchant to seek regulatory approval in one State before undertaking a transaction in another," then it directly regulates interstate commerce and is unlawful. *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 106 S. Ct. 2080, 2086 (1986).

The expressed purpose of Act 144 as applied to respondents is to enable the State of Michigan to control, according to its own criteria and in furtherance of its own domestic interests, when and whether interstate gas companies such as respondents can issue securities. See

p. 8, *supra*. Thus, Michigan can use Act 144 to obtain changes in a securities issuance in order to affect the capitalization of a company in a way that the MPSC believes to be favorable to Michigan ratepayers. Moreover, the state can and has used the statute as "leverage" to obtain other concessions from the natural gas company concerning other business operations, which are completely unrelated to the "securities" being issued. See n. 11, *supra*.

This substantial control over the financial decision-making of respondents constitutes direct regulation of out-of-state business with which Michigan has little or no connection. Conferring local advantages this way is unconstitutional economic protectionism. *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978). Even a minor securities issuance (which would not be marketed in Michigan) to finance construction entirely in a remote state is subject to a veto by petitioners. By "forcing [respondents] to seek regulatory approval in one State before undertaking a transaction in another," Act 144 "directly regulates interstate commerce," *Brown-Forman*, 106 S. Ct. at 2086, and is *per se* unconstitutional.[41] See *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 775 (1945).

B. Act 144 Violates The Commerce Clause Because The Burdens On Interstate Commerce Far Outweigh The Local Benefits Of The Statute

State statutes which are not found to regulate commerce directly nevertheless violate the Commerce Clause if the burden imposed on interstate commerce is excessive in relation to the local benefits derived under the statute. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Brown-Forman*, 106 S. Ct. 2080, 2084 (1986). "[T]he extent of the burden [on interstate commerce] that will be tolerated will of course depend on the nature

[41] The district court found that of Pipeline Company's projected construction financing requirements of $560 million, less than 10 percent would be used for facilities in Michigan. J.A. 70.

of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church*, 397 U.S. at 142. Under the *Bruce Church* balancing test, Act 144's substantial burden on respondents' wholly interstate businesses is clearly excessive given the absence of any substantial and legitimate local benefits.

1. *Act 144 Provides No Legitimate Local Benefits*

Under Act 144, the purpose of MPSC's review is to ensure that any issuance of securities by a public utility, including a natural gas company, is (1) "essential to the successful carrying out" of a lawful purpose, or (2) a distribution of "accumulated and undistributed earnings." Mich. Comp. Laws § 460.301(3). Thus, petitioners purport to regulate the basic business judgments of companies doing business wholly in interstate commerce in order to provide certain "benefits" to Michigan ratepayers, investors and creditors. None of these benefits is legitimate.

Petitioners' primary claim is that preissuance review of respondents' securities under Act 144 constitutes a review of respondents' "financial decisions" that is necessary to guard against "overcapitalization" or "overleveraging." Petitioners are interested in regulating these "financial decisions" because of their effect on the rates paid by Michigan ratepayers. See p. 8, *supra*.

But this claimed benefit is either an illegitimate means of discriminating in favor of local interests, see *Brown-Forman*, 106 S. Ct. at 2084, or a complete duplication of FERC's regulation under its authority to ensure that "[a]ll rates and charges made, demanded, or received" by respondents are just and reasonable. See 15 U.S.C. § 717c; pp. 21-24, *supra*. Moreover, it is clear that Michigan's concern that ratepayers receive "efficient and uninterrupted service at reasonable rates," Pet. Br. 35, is being fully served by FERC. *All* of the sales and transportation of natural gas by respondents are regu-

lated directly by FERC. Compare *Edgar* v. *MITE Corp.*, 457 U.S. at 644 (rejecting state's objectives because "the Williams Act provides these same substantive protections"). Thus, there are no Michigan ratepayers whose interests are not protected under the Natural Gas Act.[42]

Petitioners claim that financial regulation under Act 144 also serves purposes "which rate regulation alone" does not serve. Pet. Br. 35. Petitioners suggest that, absent preissuance review of securities under Act 144, respondents could engage in "inadequate financing" of their operations and that such inadequate financing could "jeopardiz[e]" respondents' "physical property within the state, essential to the company's ultimate service to the public." *Id.* Thus, petitioners argue that Act 144 also "serves the interests of investors [and] creditors." See Pet. Br. 35.

Petitioners' argument is based on a mistaken premise; in fact, FERC rate regulation is clearly concerned with preserving the overall financial integrity of a regulated company. See *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *FPC* v. *Memphis Light Gas & Water Div.*, 411 U.S. 458 (1973). In serving this purpose, FERC not only sets rates which are designed to generate revenues sufficient to cover operating expenses and capital costs, but also provides revenues sufficient to maintain the credit of and attract capital to regulated companies. *Id.* at 605, 611-12. In doing so, FERC provides significant protection for the interests of investors and creditors, thus making petitioners' efforts under Act 144 wholly superfluous.

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[42] In their preemption argument, petitioners take the position that MPSC regulation is complementary to FERC's and has no effect on FERC's exclusive ratemaking and certificate authority. But, this places petitioners in an untenable position. Either MPSC's financial regulation modifies or in some way affects the FERC process of comprehensive financial regulation of rates and operations, or it is simply a meaningless and duplicative regulatory hurdle, with no local benefit.

Petitioners argue that Act 144 provides a local benefit and fills a perceived "gap" in FERC's regulatory structure by regulating respondents' financing *between* FERC ratemaking proceedings.[43] But this argument ignores the pervasive federal regulation of the natural gas industry. Any "financing" for new construction, operations or acquisitions will be reviewed in the course of FERC certificate proceedings—regardless of its immediate effect, or lack of effect, on rates. 15 U.S.C. § 717f; pp. 26-29, *supra*. Moreover, issuance of any securities will ultimately be incorporated into a regulated company's capital structure and thus be reflected in its rates. See pp. 6, 8, *supra*.

Finally, petitioners state that Act 144 "protect[s] the public" from "unscrupulous transactions or unlawful securities issuances." The argument ignores the fact that respondents are subject to regulation under federal and state securities fraud provisions. Any fraud or other wrongdoing in the sale of securities is comprehensively regulated by those laws. Petitioners have not, and cannot, point to any "unlawful" or "unscrupulous" treatment of investors or creditors which could be regulated under Act 144 and not under the Federal government's and Michigan's valid securities laws and regulations.

Moreover, Act 144's protection of Michigan investors or creditors is tenuous at best. Unlike Michigan's "blue sky" securities law, Act 144 is based on the physical presence of a company's assets within the State, not sales of securities within the State. Thus, natural gas companies are required to obtain MPSC "preissuance" approval even if *no* securities will be sold in Michigan and even if there

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[43] Ratemaking proceedings are usually triggered by the filing of a new rate schedule by a natural gas company. *See* 15 U.S.C. § 717c. For natural gas companies (like Pipeline Company) whose tariffs include a purchased gas adjustment ("PGA") clause—as is the case with virtually all interstate pipelines—rates must be subjected to FERC review at least every 36 months. 18 C.F.R. § 154.38 (d) (4) (vi) (a) & (b).

are *no* investors or creditors in Michigan. Indeed, Act 144 applies even if all of the proceeds of a given securities issue are to be applied outside of the state. The sweep of the statute is "at variance with [Michigan's] asserted legislative purpose, and tends to undermine [petitioners'] justification for the burdens the statute imposes on interstate commerce." *Edgar* v. *MITE Corp.*, 457 U.S. at 644.

Stripped of generalizations, it is clear that Act 144 at best would duplicate the benefits provided by FERC's regulation of the business operations of natural gas companies; and, in fact, Act 144 imposes additional unnecessary burdens on interstate commerce. Petitioners have not demonstrated, or even suggested, a single "legitimate local purpose" or "local benefit" derived from Act 144.

2. *Act 144's Burden On Interstate Commerce Is Excessive*

Petitioners argue that their review of "financing decisions" under Act 144 is "sufficiently circumscribed so as to . . . eliminate the likelihood of arbitrary decisions based on purely parochial concerns." Pet. Br. 40 (quoting District Court op., Pet. App. B21). In plain language this means simply that Act 144 exempts certain "short term borrowings" from review and otherwise provides some statutory standards for petitioners to apply. But, it does not follow that Act 144 is "sufficiently circumscribed" to eliminate all burdens on interstate commerce.

At the outset, it defies common sense to argue that a state statute that regulates the financial decisions of a wholly interstate business in order to protect the interests of investors, creditors and ratepayers within the regulating state will not have a substantial effect on the investors, creditors and ratepayers of other states. Where petitioners, in applying Act 144, attempt to influence the "financial decisions" of regulated companies, they obviously will exercise that power in favor of Michigan residents. As this Court noted in *FPC* v. *Louisiana Power & Light*, 406 U.S. at 633, a local regulatory body must

be "obliged to regulate in the State, not the national interest."

Indeed, petitioners readily concede at least one use of Act 144 to obtain benefits for Michigan residents at the expense of non-resident customers and shareholders of respondents. Pet. Br. 4-5. American Natural Resources Company (ANR), respondents' parent company, was previously the parent of Michigan Consolidated Gas Company (Michigan Consolidated), a Michigan gas utility that distributes gas to ultimate consumers within Michigan. Pet. Br. 4. When the MPSC learned, in 1981, that ANR intended to divest its wholly owned subsidiary, Michigan Consolidated, the MPSC initiated "formal" and "informal" inquiries "conducted pursuant to its jurisdiction under Act 144 . . . ." Pet. Br. 4; J.A. 59-60, 123-29. What made the MPSC's action remarkable was that a state court had previously held that the MPSC had no jurisdiction over the divestiture. J.A. 59-60. Nevertheless, the MPSC threatened to delay the transaction, and as petitioners admit, they were able to threaten the use of their authority under Act 144 to obtain concessions that permitted the local company "to retain facilities and assets" that otherwise would have benefitted respondents' shareholders and ratepayers nationwide. Pet. Br. 4-5. The district court's finding that the MPSC can "exert influence" over respondents through control of their financing decisions (J.A. 60) is illustrated starkly by this example of petitioners' successful pursuit of local benefits at the expense of interstate commerce.

In addition to the burden on interstate commerce resulting from actual settlements or concessions coerced by petitioners [44] through its authority under Act 144, the

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[44] The record discloses two other instances where, after being advised that the application for securities approval was being set for hearing, respondents withdrew their applications "[t]o avoid the delay imposed by the hearing procedure." J.A. 40. After curing the "objections" to their activity raised by the MPSC, respondents were able to file applications, which were modified and then received prompt approval. J.A. 40, 67-68, 75.

statute imposes other transaction costs. The most costly aspect of the process is the delay in obtaining approval,[45] which the statute does not limit. The district court found that when interest rates are rising, "delay in approval of a security issuance can result in the actual cost of debt exceeding the cost used by the FERC in establishing rates." J.A. 69. It is clear that this burden on ratepayers in other states is precisely the type of burden the Commerce Clause was designed to prohibit.

The state courts that have addressed this issue have consistently held that this type of "securities" regulation violates the Commerce Clause. For example, in *Panhandle Eastern Pipe Line Co.* v. *Public Utilities Commission of Ohio*, 56 Ohio St. 2d 334, 383 N.E.2d 1163 (1978), the Supreme Court of Ohio held that a state statute regulating the issuance of securities of a natural gas company imposed an undue burden on interstate commerce because the operations of the public utility depended on its ability to issue securities. 383 N.E.2d at 1167. Other states have reached the same conclusion with respect to local securities regulation of other interstate utilities or common carriers. See *State ex rel. Utilities Commission* v. *Southern Bell Tel. & Tel. Co.*, 288 N.C. 201, 209; 217 S.E. 2d 543, 549 (1975); *United Air Lines, Inc.* v. *Illinois Commerce Commission*, 32 Ill.2d 516, 207 N.E.2d 433 (1965); *Application of United Air Lines, Inc.*, 172 Neb. 784, 112 N.W.2d 414 (1961).

An additional burden imposed on interstate commerce by Act 144 is its interference with the uniformity that is necessary to the wholesale natural gas distribution system. See *Morgan* v. *Virginia*, 328 U.S. 373, 377 (1946) ("state legislation is invalid if it unduly burdens . . . commerce in matters where uniformity is necessary"). Indeed, Michigan stands alone in its effort to

[45] Respondents' 1982 effort to obtain Act 144 preissuance approval resulted in a ten-month delay in obtaining financing for construction that was largely (90%) outside the State of Michigan. J.A. 67-68, 70.

disrupt the interstate gas system by regulatory review of financial decisions in the guise of securities regulation. Allowing an individual state's interest such as Michigan's to be accorded special weight distorts the balance of national interests and destroys the uniformity that is essential to the success of the interstate system of natural gas sale and transportation. See *Transcontinental*, 106 S. Ct. at 717. Thus, "if [Michigan] may impose such regulations, so may other states; and interstate commerce . . . would be thoroughly stifled." See *Edgar* v. *MITE Corp.*, 457 U.S. at 642.

3. *Any Local Interest Promoted By Act 144 Could Be Accomplished With A Lesser Impact On Interstate Commerce*

If the Court concludes that Act 144 serves any interest not already fully served by FERC, the statute nevertheless fails to pass muster under the Commerce Clause because the State can accomplish its purposes through less burdensome alternatives.

Under the Natural Gas Act, the states are allowed to intervene and participate actively in the regulation of natural gas companies.[46] Under 15 U.S.C. § 717c(e), any "State, municipality [or] State Commission" is permitted to file a complaint "concerning the lawfulness of [any] rate, charge, classification, or service" provided by a natural gas company. Thus, rather than using Act 144 to ensure adequate service at reasonable rates for Michigan's residents, petitioners' proper course is to present its concerns to FERC in individual cases. See 15 U.S.C. § 717d(b) (FERC may, upon request of State commission, investigate costs of production and transportation

[46] In addition, Michigan certainly can enforce antifraud provisions for any actions that actually injure investors and it can adopt provisions designed to strengthen creditors' rights to property maintained in Michigan. Such actions would not give petitioners a veto over respondents' exercise of business judgment affecting an interstate system, which is a clearly excessive response to a nonexistent problem.

even where FERC has "no authority to establish a rate"). States may also participate in certificate proceedings before FERC. 18 C.F.R. § 157.10; 18 C.F.R. § 385.214. Moreover, on *any* other possible issue of concern to petitioners, Congress has granted FERC broad authority and responsibility to take corrective steps:

> Any State, municipality, or State commission complaining of anything done or omitted to be done by any natural-gas company in contravention of the provisions of this Act may apply to the Commission by petition, which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such natural-gas company, which shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission.

15 U.S.C. § 717l. In light of the role reserved by Congress for the states participating in the comprehensive regulation of natural gas companies, there simply is no basis for any claim that the "protections" of Act 144 are necessary or can justify its burdens on interstate commerce.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY

BRIEF

No. 86-986

(10)

Supreme Court, U.S.
FILED
OCT 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of The United States

October Term, 1986

MICHIGAN PUBLIC SERVICE COMMISSIONERS ERIC J. SCHNEIDEWIND, EDWYNA G. ANDERSON and MATTHEW E. MCLOGAN,
Petitioners,

v

ANR PIPELINE COMPANY and ANR STORAGE COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ARGUMENT

I

MICHIGAN'S ACT 144 IS NEITHER PREEMPTED BY THE NATURAL GAS ACT NOR BY REGULATIONS OF THE FEDERAL ENERGY REGULATORY COMMISSION.

A. CONGRESS NEITHER OCCUPIED THE FIELD OF NATURAL GAS COMPANY SECURITIES REGULATION NOR DID IT INTEND BY ITS SILENCE IN THE NGA REGARDING SUCH REGULATION TO EITHER DEREGULATE THE FIELD OR TO BAR THE STATES FROM UNDERTAKING SUCH REGULATION.

Respondents' brief (p. 12) advances the erroneous argument that "[s]ecurities issuances used to finance the interstate sale and transportation of natural gas were clearly beyond the power of the states to control in 1938 and therefore Act 144 falls squarely within the field preempted by Congress in the Natural Gas Act." To support this conclusion, Respondents cite earlier court decisions in *Public Utilities Comm. of Rhode Island* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927); *Public Utilities Comm. for Kansas* v. *Landon*, 249 U.S. 236 (1919); and *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.* 265 U.S. 298 (1924). Yet Respondents' brief (p. 19) later admits that the referenced court decisions did *not* find that state natural gas company securities regulation fell within that field which would constitute a burden on interstate commerce, thereby barring such state regulation. Instead, Respondents state that "the 'field' occupied by the NGA should be defined as all matters relating to interstate gas operations that this Court *would have held* in 1938 were beyond the states' authority to regulate under the Commerce Clause" (emphasis supplied). Respondents thus seek to redefine the field occupied by the Natural Gas Act, 15 U.S.C. § 717 *et seq.* ("NGA"). In so doing, Respondents ask this Court to speculate that the *Attleboro* and *Barrett* Court, if it had been faced with the issue, would have found state

regulation of natural gas company securities to be beyond the purview of state regulation. Furthermore, Respondents' argument would require this Court to rigidly adhere to the *Attleboro* and *Barrett* "bright lines" tests in demarcating permissible state and federal regulation of interstate gas or electric companies, despite this Court's rejection of the same in *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm.*, 461 U.S. 375 (1983).

Respondents' premise is clearly erroneous because this Court's pre-NGA decisions in *Attleboro, et al*, concerned the states' powers to regulate rates for interstate transportation or sale for resale of gas or electricity, but did *not* involve state natural gas company securities regulation. Respondents' theory is likewise refuted by the legislative and judicial history underlying the NGA set forth in *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm. of Indiana*, 332 U.S. 507, 517–521 (1947), which was ignored by the Court of Appeals. The Court in *Panhandle Eastern* stressed that the NGA was enacted to regulate in the area of sales for resale and "not to any other sale," and to occupy only that field of regulation held to be beyond the reach of state regulation in *Barrett* and *Attleboro*. As extensively referenced in our initial brief (pp. 15–17), *Panhandle Eastern* established that Congress' purpose in the NGA was to complement and strengthen state regulation, to prevent regulatory gaps, and to preserve (and not usurp or preempt) traditional areas of state regulation, unless Congress expressly assumed an area of regulation.

The congressional purpose underlying the NGA is significant here because the states, long before passage of either the NGA or the Federal Power Act, 16 U.S.C. § 791 *et seq.* ("FPA"), had initiated public utility regulation to protect the public interest under their police powers. In many cases, this included state securities regulation applicable to utilities and national gas companies, such as The Michigan Public Utilities Securities Act, 1909 PA 144, M.C.L. 460.301 *et seq.* ("Act 144"), which was first adopted in 1909. Since the NGA was enacted to fill the regulatory gaps created in *Attleboro* and *Barrett*, relating specifically to interstate transportation or sales for resale of natural gas, the NGA clearly

was not intended to supplant state authority in the separate field of natural gas company securities regulation. Similarly, in view of the NGA's purposes, Congress, by its silence in the NGA regarding securities regulation, likewise did not intend to deregulate the field of natural gas company securities regulation or bar the continued exercise of this long-standing state function. As explained in *Panhandle Eastern*, *supra*, at 519–521, federal regulation in the natural gas area should not occur unless expressly provided for by Congress.

The NGA's express language reinforces the conclusion that Congress did not intend to occupy the field of natural gas company securities regulation, since the key jurisdictional provision, NGA § 1(b), 15 U.S.C. § 717(b), makes no mention of securities regulation and indicates that federal regulation of natural gas companies is not all-encompassing, but rather is limited to certain specified areas relating to interstate natural gas transportation or sales for resale.[1] Respondents' citation of a vague phrase in NGA's general purpose section, § 1(a), 15 U.S.C. § 717(a),neither amounts to a grant of securities regulation to FERC, nor does it constitute a congressional authorization to preempt state securities regulation.

Thus Congress, by not giving the Federal Energy Regulatory Commission ("FERC") any express powers over natural gas company securities regulation, simply intended that

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[1] Further, no other provision of the NGA provides for federal securities regulation, while several NGA provisions establish congressional intent that state and federal regulation of natural gas companies be concurrent and complementary (see our initial brief, pp. 17–18).

[2] Respondents brief, p. 12, erroneously cites the phrase "all matters relating" in NGA § 1(a), 15 U.S.C. § 717(a), as indicating congressional intent to occupy the field of all matters relating to the interstate sale and transportation of natural gas, including specifically securities regulation. Reference to this section indicates that Respondents misquoted the phrase and that it is merely a part of the section which describes the general purpose or necessity of the NGA, in part, "that federal regulation *in matters relating to* the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest" (emphasis supplied). Clearly, the referenced phrase is much less relevant to considering the nature of securities regulation than the subsection which outlines the jurisdiction of federal regulation under the NGA; namely NGA § 1(b), 15 U.S.C. § 717(b).

such regulatory authority should continue with the respective states.[3] The absence of any statutory provisions in the NGA regarding securities regulation should rule out the conclusion that Congress intended to preempt long-standing state securities regulation.[4]

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[3] On pp. 29–31 of their brief, Respondents discuss the 1950 hearings on H.R. 5306, Subcommittee of House Committee on Interstate and Foreign Commerce, 81st Cong., 2nd Sess. ("1950 House Hearings"). Respondents describe H.R. 5306 as a request by the FPC for powers "substantially similar" to those exercised by that agency over electric utilities under the FPA. The Respondents then note that H.R. 5306 was rejected, suggesting as the reason the Independent Natural Gas Association's ("INGA") opposition to H.R. 5306 based upon the adequacy of existing federal regulation.

Respondents, however, neglect to mention that INGA's opposition to H.R. 5306 was equally based upon the "adequacy of existing state regulation," 1950 House Hearings at 54. To that end, INGA's spokesman noted that at the time of the 1950 hearings, 33 state commissions regulated the issuance of securities of natural gas companies, *id.*, at 54. Indeed, the INGA spokesman stated: "In its present form the bill would exclude state regulation and create an unnecessary paramount Federal control. It would obviously eliminate State control and jurisdiction in important particulars — contrary to the basic philosophy of the Natural Gas Act," *id.*, at 54. Furthermore, an example was cited during the hearings which involved multiple authorizations given by six state commissions of the securities of an interstate pipeline, *id.*, at 24.

Respondents further neglect to mention that H.R. 5306 was likewise opposed by the National Association of Railroad and Utilities Commissioners ("NARUC"), which represented all 48 state commissions and that of the Territory of Hawaii, *id.*, at 74–81, 134–167. NARUC stated that it would support H.R. 5306 only if it were amended to specifically preserve state jurisdiction in the same manner that § 204 of the FPA preserves the authority of state commissions over electric utility securities, *id.*, at 78. The 1950 amendment may thus have been rejected for any number of reasons and it is certainly doubtful that H.R. 5306 was rejected solely because federal regulation was adequate, as Respondents have claimed.

[4] This Court has held on several occasions that a convincing showing must be made before preemption will be found with respect to areas that have traditionally been subject to the exercise of the police powers of the states. *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm.*, 461 U.S. 375 (1983). *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm.*, 461 U.S. 190 (1983). No such showing has been made here.

The cases cited by Respondents for the proposition that Congress in the NGA occupied the field of natural gas company securities regulation; namely, *Transcontinental Gas Pipe Line Corp.* v. *State & Oil Gas Board of Mississippi*, 474 U.S. 409 (1986), and *Northern Natural Gas Co.* v. *State Corp. Comm. of Kansas*, 372 U.S. 84, *reh. den.* 372 U.S. 960 (1963), are inapposite. *Northern Natural* involved the attempted state regulation of sales for resale in interstate commerce, which this Court found to be expressly within federal jurisdiction under the NGA. *Transcontinental Gas* concerned an attempt by the State of Mississippi to regulate wellhead sales of gas, another area traditionally regulated by FERC under the NGA until Congress passed the Natural Gas Policy Act, 15 U.S.C. § 3301 *et seq.* ("NGPA"), deregulating wellhead sales to permit a market-oriented approach to encourage gas production. This Court found the state's attempted entry into this newly opened area would be contrary to Congress' purpose in the NGPA. *Transcontinental Gas* is far different than this case since natural gas company securities regulation has never been subject to federal regulation or deregulation. Nor does the long-standing state securities regulation conflict with Congress' purpose in the NGA.

The single case most directly applicable to the circumstances here is *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). In *Rice* this Court found that the State of Illinois could continue to regulate the securities of a grain warehouse, even though Congress had established extensive federal regulation over the warehouse's facilities, rates, and services, and even where the federal statute expressly preempted state regulation of matters covered by the federal act. This Court held that the comprehensive federal regulation did not expressly include the field of securities regulation, and that the state securities regulation reached objectives not covered by federal law. Thus, in the face of the federal act's silence concerning securities regulation in an otherwise comprehensive federal regulatory framework, this Court in *Rice* refused to find federal preemption of the securities field unless that was the "clear and manifest purpose of Congress" (331 U.S. 218, 230). The same conclusion should apply here. Indeed, a more compelling factual and legal history for nonpreemp-

tion can be made here than in *Rice*, in view of this Court's holdings concerning the NGA in *Panhandle Eastern*, *supra*.

It must therefore be concluded that Congress in the NGA did not occupy the field of natural gas company securities regulation, and Respondents' claim of preemption under this theory must fail.

B. MICHIGAN'S ACT 144 HAS NOT BEEN IMPLICITLY PREEMPTED BY FERC REGULATION UNDER THE NGA.

1. ACT 144 IS NEITHER PREEMPTED BY § 4 OF THE NGA NOR DOES IT INTERFERE WITH FERC'S POTENTIAL REVIEW OF A NATURAL GAS COMPANY'S CAPITAL STRUCTURE OR WITH FERC'S RATEMAKING AUTHORITY.

Respondents claim that Act 144 is preempted by NGA § 4 "because it interferes with FERC's control of a natural gas company's capital structure, which is central to FERC's ratemaking authority" (Respondents' brief, p. 21; see also pp. 6–9, 12–13, 21–26). Respondents' oblique, Rube Goldberg-like theory is that Act 144 affects a natural gas company's capital structure which, in turn, affects the cost of service which, in turn, affects rates which, in turn, are subject to exclusive FERC jurisdiction which, in turn, leads to the conclusion that Act 144 constitutes rate regulation which has been preempted.

Respondents' new theory was never presented to either court below, is meritless and without any factual support in the record. Respondents' theory is unreasonable and blurs the separate functions and purposes of ratemaking and securities regulation. Act 144's preissuance, or "before-the-fact," review of proposed long-term securities issuances examines proposed securities before they become permanent binding obligations of the applying company. As construed by recent

Michigan Supreme Court cases,[5] Act 144, when applied, serves to protect investors, ratepayers, or the general public, by ensuring that companies vital to Michigan do not become overleveraged, overcapitalized, and do not issue securities for unlawful purposes. The state court has indicated in these cases that Act 144's purpose is to reach objectives that ratemaking alone cannot address, and that Petitioners may exercise authority over natural gas company securities even though no regulatory authority is exercised over the companies' rates. Michigan's highest court has recognized that securities regulation is clearly separable from ratemaking, and achieves different, albeit complementary, objectives.

Unlike securities regulation, the ratemaking function, whether exercised by FERC or the MPSC, involves an "after-the-fact" determination of a company's rates based upon a review of its overall cost of service. This review includes a calculation of the company's cost of capital (overall rate of return) to be applied to the company's undepreciated net investment rate base. (Regardless whether the cost of capital is determined based upon an actual or hypothetical capital structure, the cost of capital for ratemaking purposes is calculated by multiplying the ratio of each element of the capital structure, *i.e.* debt, equity, and tax deferrals and credits, by the average cost of each element, and then combining the product for all elements, to determine the overall rate of return to be applied against the company's investment rate base). These rate determinations do not alter the status of the company's securities as binding obligations against the property and assets of the company. In short, ratemaking does not examine whether the company is overcapitalized or overleveraged in relation to the property and assets of the business, nor does the ratemaking function have any ability to determine whether the securities should be issued in the first instance [6]

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[5] *Michigan Gas Storage Co.* v. *Public Service Comm.*, 405 Mich. 376; 275 N.W.2d 457 (1979), *Indiana & Michigan Power Co.* v. *Public Service Comm.*, 405 Mich. 400; 275 N.W.2d 450 (1979), and *Attorney General* v. *Michigan Public Service Comm.*, 412 Mich. 385; 316 N.W.2d 187 (1982).

[6] Respondents suggest that the function of ensuring against overcapitalization or overleveraging is limited to regulating a company's capital structure; namely, the relationship between debt and equity, which FERC

(footnote continued on next page)

Thus, Act 144 neither conflicts with nor intrudes upon FERC's ratemaking powers. It is primarily the company's issuance of securities, rather than either Act 144 securities regulation or FERC ratemaking, that affects a company's capital structure. Moreover, a company's capital structure, or debt and equity ratio, is usually not controlling when determining under Act 144 whether a company is issuing securities for an unlawful purpose, or will be overcapitalized in relation to the value of its property and assets. Further, FERC's review of a company's capital structure is totally unimpeded and unchanged, regardless whether the securities are subject to preissuance review under Act 144 [7] Thus, the theory that Act 144 review of individual securities issuance proposals can ultimately affect the makeup of the company's capital structure, and that the capital structure of a company can have an impact upon rate levels, is far too

(footnote continued from previous page)

reviews in setting rates. Respondents' arguments are erroneous because overcapitalization and overleveraging in large measure relate not to the relationship of equity and debt, but to the degree of capitalization or securities issued as it relates to the amount and value of the utility's property. As indicated in Respondents' brief, p. 6, n. 7, in citing *Attorney General* v *MPSC*, *supra*, Act 144 " 'protects against over-capitalization . . . by determining that the amount of [the utility's] capital stock and bonds . . . correlate[s] with the amount and value of its property.' " A significant amount of Respondents' property is located in Michigan, and the services received from such property are integral to the health, safety and welfare of Michigan citizens. Thus, Michigan has a direct interest in ensuring that this property does not become overleveraged or overcollateralized, adversely impacting the maintenance and viability of the property and the reliability of gas service to Michigan.

[7] There exists no difference in FERC's ratemaking function in situations where preissuance security review is undertaken compared to where it is not. If a securities issuance is not authorized by Act 144, the proposed securities do not become part of the capital structure which FERC reviews for determining an overall rate of return for setting rates. Correspondingly, if the securities are authorized, FERC reviews the costs along with the rest of the capital structure for purposes of the overall rate of return determination. FERC's review of the capital structure is undertaken in the same manner in either case. However, FERC in determining the cost of capital in ratemaking does not have the ability to pass upon whether the securities should have been issued in the first instance.

indirect to support a claim that Act 144 intrudes upon FERC's ratemaking power.[8]

Furthermore, in evaluating a specific proposed securities issuance, Act 144 focuses primarily upon the particular securities involved (whether it be debt or equity), to determine whether the proposed issuance is undertaken for lawful purposes, or would result in overcapitalization or overleveraging. Such a determination primarily regulates the securities issuance rather than the overall capital structure (relationship between debt and equity) of the company.

Respondents also improperly characterize the purposes of Act 144 as being limited to protecting either ratepayers or investors. They assert that Act 144 is designed to essentially regulate rates, which only FERC may undertake. While Act 144 clearly is not intended as an exercise of the ratemaking function, the fact that Act 144 may in some ways protect ratepayers, as well as investors and the overall public interest, does not mean that Act 144 usurps or interferes with FERC's ratemaking powers. Respondents' claims that Act 144 securities regulation is preempted because of interference with FERC ratemaking functions is directly undermined by Congress' action in an analogous regulatory scheme involving the regulation of interstate electric companies, wherein Congress provided for federal authority over ratemaking while recognizing in FPA § 204 state authority over securities regulation. Respondents' position is further refuted by this Court's holding in *Rice*, *supra*, which determined that state securities regulation and federal rate regulation are separable areas

[8] Considering the regulatory purpose of Act 144, there exists no basis to Respondents' unstated and unproven premise that Act 144 increases the regulated company's cost of its capital structure. It is more likely that Act 144 can aid in keeping Respondents' costs lower by preventing issuance of inappropriate securities. Even if some increased costs result from Act 144, however, this would not support a finding of preemption under FERC's ratemaking powers. Numerous exercises of state police powers can affect a natural gas company's costs of doing business which are includable in rates, such as state property or severance taxes, various permit requirements, workers' compensation laws, state corporation filing requirements, among other state requirements. Respondents' preemption theory includes neither any standards nor limits to its possible application.

of regulation aimed at achieving different goals and functions, which can co-exist in a complementary fashion.[9]

Respondents suggest that Act 144 is improper because blue-sky laws can fully protect investors. However, blue-sky laws generally involve only registration requirements, and are aimed solely at protecting investors. Act 144, contains more stringent requirements involving preissuance review and approval of securities. There is no legal basis to conclude that Act 144 is either preempted, or otherwise unlawful, merely because other state or federal securities acts may provide for more limited regulation aimed at protecting only investors. Finally, blue-sky laws, unlike Act 144, do not ensure that the regulated company neither becomes overcapitalized nor overleveraged, nor issues securities for unlawful purposes.[10]

The only conclusion is that Act 144 is not preempted by FERC's ratemaking authority under NGA § 4. No conflict or interference with federal authority is present here, nor has it ever existed.

2. ACT 144 IS NOT PREEMPTED BY FERC'S CERTIFICATE AUTHORITY UNDER NGA § 7

[9] Respondents' theory that Act 144 is an attempt at ratemaking is all the more specious when it is remembered that Respondent ANR Storage engages in no interstate gas transportation or sales whatsoever, and has no FERC-regulated transportation rates. There also exists no relationship between ANR Storage and the interstate pipeline functions of ANR Pipeline. (See our initial Brief, pp 9–10, and n. 9 and n. 11). Further, while FERC apparently sets storage rates for ANR Storage, the record is unclear concerning such regulation or the basis of FERC's jurisdiction in view of the jurisdictional limits established by NGA § 1(b), 15 U.S.C. § 717(b).

[10] Respondents also improperly suggest that the MPSC has utilized Act 144 in actions and negotiations involving issues unrelated to the securities themselves, citing a situation in which Respondents unilaterally withdrew a securities application because hearings were going to be scheduled on the application (Respondents' brief, p. 9, n. 11). The securities were then approved following the resubmission of the application and the entry of a settlement reached between ANR, the parent company of Respondents, and the MPSC. The cited situation involved appropriate MPSC review of the securities transactions relating to the divestiture of Michigan Consolidated Gas Company (MichCon), a regulated Michigan utility and then-subsidiary of ANR, from ANR.

Contradicting their argument that Congress preempted state natural gas company securities regulation for purposes of deregulation in the manner of *Transcontinental Gas, supra*, Respondents suggest that FERC is presently undertaking the equivalent of securities regulation pursuant to NGA § 7 certificate powers and its regulations thereto, 18 C.F.R. § 157.14 (J.A.150–151), and that Act 144 is preempted thereby (see Respondents brief, pp. 4–5, 13, 26–32).

Respondents' theory is incorrect because neither NGA § 7, nor any other NGA provision, grants FERC express authority to regulate securities. The conclusion must be that even if FERC can regulate construction financing plans under its § 7 certificate powers, Congress intended state securities regulation to remain, recognizing the complementary nature of and purposes of such regulation under the dual jurisdictional framework established by the NGA.

FERC's § 7 certificate powers clearly do not constitute regulatory authorization over natural gas company securities. The provisions of 15 U.S.C. § 717f(e), which allows FERC to condition the issuance of a construction certificate upon "such reasonable terms and conditions as the public convenience and necessity may require," does not amount to an affirmative grant of statutory authority to engage in preissuance securities regulation. Whatever may be said with respect to conditions concerning rates and other matters over which FERC has specific authority under the NGA, it would appear clear that the power to prescribe "reasonable conditions" in certificates cannot be greater in scope than the statutory authority of FERC. Since the NGA does not grant FERC the authority over securities issuances,[11] FERC

[11] In a special 1945 issue of the George Washington Law Review to commemorate the 25th anniversary of the FPC, the agency's historical development and the extent of its powers were exhaustively reviewed. 14 Geo. Washington L. Rev. 1-272. In an article entitled, "Jurisdiction of the Federal Power Commission and of State Agencies in the Regulation of the Electric Power and Natural Gas Industries," the author bluntly stated: "The Federal Power Commission has been given no jurisdiction over the issuance of securities under the Natural Gas Act," 14 Geo. Washington Law Rev. 74. This conclusion is also obvious from the lack of statutory standards and objectives concerning securities regulation in NGA § 7, compared to FPA § 204 governing interstate electric companies.

can hardly expect to reasonably reach the same result indirectly by conditioning a certificate to control securities issuances. Such action would be contrary to this Court's ruling in *Louisiana Public Service Comm.* v. *Federal Communications Comm.*, 476 U.S. 355; 90 L. Ed. 2d 369, 385 (1986), which held that "a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority" and that "an agency literally has no power to act, let along pre-empt . . . unless and until Congress confers power upon it."

Moreover, FERC itself has not interpreted its regulation, 18 C.F.R. § 157.14, to constitute securities regulation, in view of its repeated requests to Congress for such authority for 25 years (see our initial brief, pp. 25–26, n. 16). Nor does the regulation contain any standards for securities regulation, or indicate an attempt to preempt state securities regulation. An administrative regulation which intends federal preemption of state law must declare such intention with some specificity, as held by this Court in *California Coastal Comm., et al* v. *Granite Rock Co.*, 480 U.S. ___; 94 L Ed 2d 577 (1987).

Act 144's preissuance securities regulation and FERC's regulation requiring the filing of a "financing plan" as part of an applicaiton for a construction permit under NGA § 7 operate in different spheres and are undertaken for different purposes. FERC's regulation is designed to aid FERC in reviewing the feasibility of the proposed construction, and to ensure that the applicant has adequately planned the proposed project. 1942 U.S. Code Congressional and Administrative News, p 188. On rare occasion, FERC may also review the financing plan for purposes of developing initial rates applicable to the project, if an application for project financing is involved [12] Clearly, however, FERC's NGA § 7 powers

[12] On pp. 27–28 of Respondents' brief, several cases are cited for the proposition that FERC often conditions its certificate approvals upon the issuance of specific securities covered by its filed financing plan. Most of the cases cited relate to the rare situation where FERC has approved "project financing" for the project; i.e., inclusion in customer rates of a revenue stream to pay for costs of constructing the project, thus requiring

(footnote continued on next page)

are strictly limited to essentially construction projects. Thus, even if FERC's regulation were construed to be the equivalent of securities regulation, it is limited to the narrow area relating to new construction. It cannot apply to other instances in which a natural gas company may seek to issue new securities in which FERC would have no regulatory review powers whatsoever.[13]

No evidence exists that compliance with both FERC's NGA § 7 filing requirements and Act 144 is physically impossible. Indeed, any financial planning undertaken for FERC certification could presumably be useful for purposes of obtaining Act 144 approvals. The fact that both a financing plan must be filed at FERC and a securities application under Act 144 does not by itself establish a regulatory conflict. It only means that in construction situations both state and federal filing requirements must be met, as upheld in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm.*, 461 U.S. 190 (1983), with respect to the construction of a nuclear plant.

There also exists no facts in this case to suggest that Act 144 conflicts with or frustrates the purposes and objectives of Congress in NGA § 7. Both FERC's § 7 regulation and Act 144 serve the complementary purpose of protecting the public from potential abuses of natural gas companies and in

(footnote continued from previous page)

more detailed FERC review to establish initial rates to cover the project costs. Respondents have not suggested that they have used project financing, nor are such arrangements at all likely to result in conflicts with Act 144 regulation. FERC jurisdiction to require customers to finance construction costs of a project may also be subject to challenge.

[13] Further, any chance for limited regulatory overlap in construction situations is neutralized by the Michigan Supreme Court's interpretation of Act 144 in *Attorney General* v. *Michigan Public Service Comm.*, 412 Mich. 385; 316 N.W.2d 187 (1982), wherein the court determined that the purpose of Act 144 in construction situations is not to inquire into the need for a specific project being constructed, but to examine matters relating to the more limited objectives of Act 144 such as whether the securities are being issued for a lawful purpose. Act 144 thus looks to the achievement of other objectives (issuance of securities for a lawful purpose, prevention of overcapitalization and overleveraging) compared to FERC's reviews under NGA § 7 (determination of need and feasibility of specific projects involving construction or extension of new facilities).

filling regulatory gaps that otherwise would exist, *Panhandle Eastern*, *supra*. Act 144 therefore is not preempted by NGA § 7 or FERC regulations adopted thereunder.

C. ACT 144 DOES NOT CONFLICT WITH THE NGA AS ADMINISTERED BY FERC.

Respondents argue that Act 144 is preempted because there exists an "imminent possibility" of conflict between Act 144 and the NGA, citing *Maryland* v. *Louisiana*, 451 U.S. 725, 748 (1981), and *Northern Natural*, *supra* (Respondents' brief, pp. 11, 14, 32–34). Respondents also cite the Court of Appeals' pipeline construction hypothetical, and suggest that there is an inherent "tension" between national goals under the NGA compared to state objectives under Act 144. Further, Respondents repeat claims regarding Act 144 interference with FERC's NGA ratemaking and certificate powers, and state that Congress intended not to "burden" natural gas companies with preissuance review, either by undertaking such review at the federal level or by permitting it at the state level.

The cases cited by Respondents are clearly inapposite. Both *Maryland* and *Northern Natural* involved *actual* conflicts between state and federal law. Further, as discussed, no conflict whatsoever exists between Act 144 and FERC's ratemaking and certificate powers. The District Court specifically found (C.P.A. B-21) that "[n]o evidence has been presented that any FERC certification or rate proceeding has ever been disrupted or affected by defendants' proceedings under Act 144" and that "[n]either have plaintiffs presented any evidence that the average three week delays in securing MPSC approval on their applications have ever adversely affected either the cost or the overall marketability of any of plaintiffs' securities issues." Further, FERC review under NGA § 7 does not accomplish the purposes of Act 144; *i.e.*, prevent overcapitalization, overleveraging, or to ensure against the issuance of unlawful securities.

Similarly, no facts exist to establish any "tension" between the national objectives and purposes under the NGA and those of the state under Act 144. The Court of Appeals'

hypothetical conflict regarding a pipeline construction situation is wholly illusory and theoretical. Further, numerous hypotheticals or actual examples of Act 144's usefulness, and compatibility with the NGA, can be cited, such as where Act 144 review was undertaken to protect Michigan's interests, without harming national interests, relative to securities transactions relating to ANR's divestiture of Michigan Consolidated Gas Company, a fully regulated local utility. As this Court has stated in *California Coastal*, 94 L Ed 2d. 577, 596–597, *supra*, a state statute will not be found to be preempted in a facial challenge where any possible exercise of the state's power would not be preempted. Thus, the Court of Appeals' erroneously sought to find a conflict where none has existed, instead of recognizing clear areas of compatibility between the NGA and Act 144.

Respondents also fail to present credible authority for their position that Congress in the NGA intended to bar both federal and state preissuance securities review on the basis such regulation is overly burdensome (Respondents' brief, pp. 29, 34). Not only do Respondents fail to explain the "burdens" involved, but they fail to recognize that this claim is inconsistent with their position that FERC under NGA § 7 is essentially undertaking preissuance securities review. Contrary to Respondents' position, Congress' silence regarding securities regulation in the NGA constitutes, at a minimum, congressional willingness to allow the states to continue regulating in this area. Congress in the NGA did not intend to grant natural gas companies any federal immunity or exemption from state regulatory laws based solely upon their identity as companies regulated by the federal government relative to some aspects.

The bottom line is that there are no facts in this case or in the 78-year history of Act 144 to support the theory that Act 144 "actually conflicts" with the NGA, or fits Respondents' new criteria concerning the "imminent possibility" of such a conflict. Rather, as this Court found in the analogous situation in *Rice*, *supra*, the possibilities of a conflict are merely "conjured up," and cannot support a finding of preemption.

II

ACT 144 IS A VALID EXERCISE OF STATE POLICE POWERS AND DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Respondents' argument that Act 144 violates the Commerce Clause may be divided into three categories. First, that Act 144 represents unconstitutional economic protectionism. Second, that no ligitimate local benefits exist, thereby implying an improper motive to the Michigan Legislature's passage of Act 144. Third, that Act 144 is contrary to the need for national uniformity in the regulation of natural gas company securities issuances.

A. ACT 144 DOES NOT CONSTITUTE ECONOMIC PROTECTIONISM.

Although the Respondents have claimed that Act 144 represents economic protectionism, they have not really shown how. Certainly, Act 144 is not protectionist in the traditional sense. That is, Act 144 does not attempt to favor a state business or corporation at the expense of a competing foreign business or corporation. Furthermore, Act 144 contains no requirement that certain business operations be performed locally, as was the case in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), or that Michigan resident investors be provided with preferential rights to securities issuances. Indeed, on its face, Act 144 makes absolutely no distinction between local and foreign firms.

Instead, what Respondents argue is that Michigan, through Act 144, can affect Respondents' securities issuances in a manner that will unconstitutionally confer local advantages. To support this proposition, Respondents cite *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), which involved a New Jersey statute that effectively closed New Jersey landfills to solid waste or liquid waste from outside the state. This Court held that, even assuming the general purpose of the state statute was environmental, New Jersey could not place the

burden of achieving its environmental goals solely on the shoulders of foreigners while exempting its own local competing businesses. The statute under review in *Philadelphia* v. *New Jersey* essentially amounted to an embargo that *discriminated* against nonresident businesses. By comparison, no discrimination is present here.

There is no evidence to support a claim that Act 144 discriminates against foreign utilities or interstate commerce in favor of local utilities or commerce, or that there is any advantage conferred upon those in Michigan at the expense of those not in Michigan. Hypothetical, unproved and unsupported allegations alone cannot support a claim that Act 144 constitutes economic protectionism. There must be at least some proof or demonstration of discrimination which is totally lacking in this case.

B. ACT 144 PROMOTES A VALID LOCAL INTEREST AND NO IMPROPER MOTIVE CAN BE ATTRIBUTED TO ITS ENACTMENT.

In *Michigan Gas Storage Co.* v. *Public Service Comm.*, 405 Mich. 400; 275 N.W.2d 450 (1979), the Michigan Supreme Court identified the local interests served by Act 144:

> "Proper securities regulation serves the interests of the ratepayers in assuring continued service without interruption from utilities and in receiving that service at reasonable rates. For example, physical property of a company within the state, essential to the company's ultimate service to the public, could be jeopardized by inadequate financing, resulting in a failure of that service. We see no reason to conclude that the Legislature would have intended to forego participation in regulating matters affecting interests with respect to which the state may properly exercise its protective powers because it is not also regulating other aspects of the business.
>
> "In sum, we can find nothing in the language of MCL 460.301; MSA 22.101 or in logic to require the conclusion that the Legislature intended the Public Service

> Commission to limit the exercise of jurisdiction over the issuance of securities to utility companies whose rates it also regulates."
>
> 405 Mich. 376, 391; 275 N.W.2d 457, 462

Ensuring the continued viability of utility service to its citizens is a legitimate local concern, subject to regulation under the state's police powers. Moreover, the Respondents' argument that this concern is already comprehensively covered by federal regulation is incorrect.

Federal regulation by FERC of Respondents' securities issuances, if it exists at all, is limited to the financing of construction projects. Other securities issuances, even though they may affect a public utility's ability to continue to provide utility service, are not. These may include securities issuances to finance a Disneyland-like theme park, underwrite the takeover of another company by pledging the assets of the utility, or to engage in unreasonable transactions solely to defend entrenched management from a merger. Furthermore, the argument that this concern is covered by FERC's "after-the-fact" review of a utility's capital structure does not address the local interest that Act 144 seeks to serve by preissuance review of securities. While the vast majority of preissuance securities reviews conducted under Act 144 have been expeditious, that does not mean that they have been perfunctory or without value. One cannot conclude that if the power under a statute is rarely exercised to the degree that hearings are required that it is a power that should be dispensed with. To some extent, Act 144 may represent a "club in the closet" whose value is not fully appreciated absent a factual context. But it is nonetheless a valuable tool which ensures the viability of local utility property and service, while acting as a deterrent against potential abuses.

Another aspect of the Respondents' claim that no legitimate benefit is served by Act 144 is the implication that the Michigan Legislature had an improper motive when it enacted it. An improper motive by definition, under a Commerce Clause analysis, would be one that promotes a protectionist purpose. As noted earlier, Act 144 on its face does not discriminate against foreign utilities in favor of local utilities

since both are equally regulated under the Act. Indeed, a local public utility which is subject to regulation under Act 144 and markets securities out-of-state is subject to the same degree of regulation as a foreign corporation subject to Act 144. Furthermore, Act 144 was enacted in 1909, nearly 30 years prior to the advent of the NGA, at a time when there was no distinction between a federally regulated utility and a state regulated utility. In conclusion, Act 144's avowed purpose is not protectionist and makes no distinction on i's face between local and foreign firms. There is absolutely no evidence to suggest that the motive of the Michigan Legislature was to favor Michigan's interests in foreign markets or to obtain a local preference with regard to foreign markets. Its sole purpose, applicable to all, is to ensure the continued viability of utility facilities located in Michigan and of utility service to Michigan residents.

C. THERE IS NO EVIDENCE TO SUGGEST A NEED FOR NATIONAL UNIFORMITY IN THE REGULATION OF NATURAL GAS COMPANY SECURITIES ISSUANCES.

Respondents' unsupported argument that the regulation of natural gas company securities issuances requires national uniformity should once and for all be laid to rest.

The claim that such national uniformity is required is belied by the fact that the FPA, which governs interstate electric companies, permits the preissuance review of securities by more than one state.[14] It is difficult to understand Respondents' argument that there is a need for national uniformity in the regulation of interstate natural gas company securities when Congress in the FPA saw no similar need for such uniformity for interstate electric companies.

Additionally, there is no evidence to suggest that such a national uniformity is needed. Respondents' challenge, it

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[14] *Amici* Council of State Governments, *et al*, point out on p. 24, n. 13 of their brief, that at least one electric utility must obtain approval from five state commissions before issuing securities.

must be remembered, is facial. There is neither a pending application of Respondents before the MPSC nor does this case involve the review of an actual controverted filing involving the parties. Instead, this Court is reviewing a state statute that has, without incident, co-existed with federal regulation since the NGA's inception in 1938. In effect, the Court is being asked to find that Act 144 is patently invalid for a set of facts that are not known and which might very well demonstrate a lack of need for national uniformity.

Finally, Petitioners would submit that Act 144's purpose which addresses local concerns is such that any effects it may have nationally are, by comparison, incidental. Whatever resulting delay or costs that might result to foreign investors or Respondents from Michigan's enforcement of Act 144 is small in comparison to ensuring the viability of natural gas properties in Michigan and/or services to Michigan residents. Moreover, the "costs" incurred by Respondents or their foreign investors due to Act 144 are wholly unproven and should not be presumed to exist. In sum, there is no demonstrable need for national uniformity in the regulation of securities issued by natural gas companies.

CONCLUSION

Petitioners respectfully request this Honorable Court to reverse the decision of the Court of Appeals below, and find that Michigan's Act 144 is neither preempted by federal law nor does it constitute an impermissible burden on interstate commerce.

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DATED: October 23, 1987

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAY 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHIGAN PUBLIC SERVICE COMMISSIONERS, ERIC J. SCHNEIDEWIND, EDWYNA G. ANDERSON, and MATTHEW E. MCLOGAN,
Petitioners,

v.

ANR PIPELINE COMPANY and ANR STORAGE COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, AND UNITED STATES CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

I

Whether Michigan Act 144, which regulates the issuance of securities by "natural-gas companies" serving Michigan customers, is implicitly preempted by the Natural Gas Act, as amended.

II

Whether Michigan Act 144 burdens interstate commerce in violation of the Commerce Clause.

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INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* and their members have a vital interest in legal issues that affect the powers and responsibilities of state and local governments.

The court below overturned on preemption and Commerce Clause grounds a Michigan statute authorizing the regulation of the issuance of securities by natural gas companies conducting substantial operations within the State. Some of these companies, including respondents, are subject to regulation by the Federal Energy Regulatory Commission ("FERC"); however, this federal regulatory scheme does not encompass approval of the issuance of securities. The decision of the court below would eliminate any regulation of the issuance of securities by gas companies and potentially other utilities serving Michigan and other States. *Amici* are deeply concerned that the court's decision would leave gas consumers and securities investors in the various States unprotected from the dangers of overcapitalization by companies whose primary function should be to provide natural gas service to the public. The decision below, moreover, is not supported by any evidence of congressional intent to preempt such state regulation, and its conclusions concerning the potential impact of the Michigan law on interstate commerce rest upon inference and conjecture rather than fact. *Amici* maintain that regulation of securities issuances of gas companies and other utilities is a matter traditionally conducted by States and remains a matter to which the States are well-suited.

Because this case is of great importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT OF THE CASE

This case concerns the validity of 1909 Mich. Pub. Acts 144 ("Act 144"), codified at Mich. Comp. Laws Ann. § 460.301 *et seq.* Act 144 provides that certain companies transporting natural gas for public use in Michigan may

[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

issue securities only after approval by the Michigan Public Service Commission ("MPSC"). *Id.* at § 301 sec. 1(1).[2] MPSC's jurisdiction over securities issuances reaches only those gas companies that derive more than 5% of their consolidated gross revenues from natural gas operations in Michigan. *Id.* at § 301 sec. 1(8). Act 144 and a predecessor statute have governed issuances of securities by such companies since 1909. *See* 801 F.2d at 233.

Almost thirty years later, in 1938, Congress enacted the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, requiring the Federal Power Commission ("FPC") to regulate the wholesale sales and transportation of natural gas in interstate commerce. *E.g.*, 15 U.S.C. § 717(b), c, d, e, and f. *See Atlantic Refining Co. v. Public Service Comm'n*, 360 U.S. 378, 387-92 (1959). Entities subject to Natural Gas Act regulation by the FPC and, since 1977, the Federal Energy Regulatory Commission ("FERC"), successor to the FPC,[3] are defined as "natural-gas companies." 15 U.S.C. § 717a(6).

Neither the Natural Gas Act nor FERC's implementing regulations require advance approval by FERC of the issuance of securities by "natural-gas companies." Moreover, neither the Act nor the regulations expressly prohibit the advance approval by States, such as Michigan, of the issuance of securities by "natural-gas companies."

A. STATEMENT OF FACTS

Respondents, ANR Pipeline Company ("Pipeline") and ANR Storage Company ("Storage"), are "natural-gas companies" subject to FERC regulation under the Natural Gas Act (Joint Appendix ("J.A.") at 66, 74).

[2] The pertinent part of Act 144 is set forth in the opinion of the court of appeals, *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228, 229-30 n.1 (6th Cir. 1986), Pet. App. A1-A3, n.1.

[3] Hereafter, "FERC" will be used for all references to the FPC or FERC.

See also ANR Storage Company, 8 FERC ¶ 61,059, p. 61,205 (July 23, 1979).

Pipeline is an interstate natural gas pipeline with its principal office in Detroit, Michigan, and is a subsidiary of American Natural Resources Company (ANR), whose principal office is also in Detroit, Michigan (J.A. 59). Over 50% of Pipeline's sales during 1983 (which were to local gas distributors for resale) were in Michigan (J.A. 65). Pipeline is by far the largest supplier of natural gas consumed in Michigan; during 1984, the company provided over 40% of the gas consumed in the State (J.A. 191).

Storage, also a subsidiary of ANR, was organized under the laws of Michigan, and has its principal office in Detroit, Michigan (J.A. 59, 70). Virtually all of Storage's gas storage reservoirs are located in Michigan (J.A. 71).

Whenever Pipeline and Storage desire to issue long-term securities, they must seek prior approval of the MPSC under Act 144. Since 1979, Pipeline and Storage have received MPSC approval of all proposed securities issuances (J.A. 67). At no time have respondents alleged that the MPSC's exercise of authority has blocked any proposed construction or extension of their facilities subject to FERC regulation, or disrupted any FERC proceeding.

B. COURT PROCEEDINGS BELOW

Respondents initiated a facial challenge to Act 144, arguing that Act 144 violates the Supremacy and Commerce Clauses of the Constitution. The district court rejected these contentions. *ANR Pipeline Co. v. Schneidewind*, 627 F. Supp. 923 (W.D. Mich. 1985).

On the Supremacy Clause question, the district court found that "neither the [Natural Gas Act] nor the Federal Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, con-

tains express preemptive language with respect to utilities securities transactions, nor do they manifest Congressional intent to occupy the entire field of utilities securities transactions." 627 F.Supp. at 927. The court went on to point out that "[respondents] do not argue, nor could they, that joint compliance with the [Natural Gas Act], the 1933 [Securities] Act, and Act 144 is a 'physical impossibility.'" *Id.* at 928. The court was therefore "unwilling, on this facial challenge to the [MPSC's] mere assertion of jurisdiction under Act 144, to assume that the 'potential disruption or interference' which [respondents] fear is so likely to occur as to preclude any regulation of securities issuances under Act 144 at all." *Id.* at 930.

On the Commerce Clause contention, the district court found that Act 144 operated evenhandedly on both interstate and intrastate gas companies. *Id.* at 932. The court also found that Act 144 served a legitimate local interest, being motivated "'by the evil and injurious effects on the public of overcapitalization.'" *Id.* at 931, *quoting Indiana & Michigan Power Co. v. State of Michigan*, 275 N.W.2d 450, 453 (Mich. 1979). In the final analysis, the district court found that "the record reveals . . . [that the] relatively limited state regulation [under Act 144], as applied to [respondents], has historically had an indirect and minimal effect on interstate commerce." *Id.* at 933.

The court of appeals reversed, finding that Congress, when it failed to give FERC regulatory authority over the issuance of securities by "natural-gas companies," had "implicitly determined that the States should not impose such regulations." 801 F.2d at 233-34. The court held that Act 144 also violates the Commerce Clause, finding that the "expense, delay, and administrative hassle of [state] 'advance approval' securities regulation far outweighs the benefits, if any, of Michigan's interests in protecting consumers and investors." *Id.* at 238.

MPSC's petition for a writ of certiorari followed.

SUMMARY OF ARGUMENT

1. The court below erred in upholding a facial challenge to Act 144. The holding that the Act is preempted by the Natural Gas Act finds no support in the language of the Act, its purpose, its legislative history, or its implementation by the responsible federal agency and, moreover, is inconsistent with the controlling decisions of this Court.

Preemption of state laws is not to be lightly inferred. In the absence of an express or implied congressional intent to preempt or an actual conflict with federal law or regulation, a state statute will be preempted only if it "frustrates the purpose of the federal law." *CTS Corp. v. Dynamics Corp. of America*, No. 86-71, slip op. at 8 (U.S. April 21, 1987). The regulatory scheme of Act 144, however, complements rather than obstructs the federal regulatory scheme embodied in the Natural Gas Act.

The Natural Gas Act was enacted to fill a gap between state and federal regulation of the transportation, distribution, and sale of natural gas. The Act does not purport to regulate gas company securities issuances, and its legislative history contains no indication of any intention to deprive the States of their historic exercise of jurisdiction over such issuances. Both before and after enactment of the Natural Gas Act, Congress rejected legislative proposals that would have conferred authority on the FPC (or its successor, FERC) to regulate securities issuances by "natural-gas companies." Although FERC must approve "the construction or extension of any facilities" for the interstate transportation or resale of natural gas, and requires the filing of financial information to discharge that responsibility, the agency has no authority to regulate the issuance of securities, even when they are used to finance such construction. Thus, the decision below would create a regulatory gap by leaving totally

unregulated the issuance of securities by natural gas companies, ironically in the name of the Natural Gas Act, which was enacted to close a different regulatory gap.

Any conflict between Act 144 and the federal regulatory scheme is purely hypothetical and speculative. This Court has upheld more intrusive state regulation of other public utilities in the face of even more comprehensive federal regulatory enactments.

The practical effect of the decision below is to permit gas companies to use their vital assets dedicated to public service as collateral to raise funds through the unregulated issuance of securities for purposes unrelated to the providing of gas service. The States should remain free to protect the public in an area beyond the reach of FERC's jurisdiction.

2. Act 144 imposes no undue burden on interstate commerce. It is restricted to companies doing a significant part of their business in Michigan, and these respondents in fact have a substantial presence in the State. The court below failed to weigh the State's strong interest in the regulation—protection of investors, creditors, and ratepayers as well as the general public from "the evils and injurious effects" of overcapitalization—against the minimal impact of Act 144 on certain aspects of interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The conclusion of the court of appeals that there would be an undue burden from multiple regulation of the securities issues of a single entity finds no support whatever in the record. It is answered, moreover, by the experience of other public utilities, subject to the Federal Power Act, 16 U.S.C. § 824 *et seq.*, that have successfully complied with the regulations of more than one State in issuing securities. Act 144 has no extraterritorial impact, except for the inevitable incidental effect of any state regulation on any interstate business.

ARGUMENT

I. ACT 144 DOES NOT VIOLATE THE SUPREMACY CLAUSE OF THE CONSTITUTION

A. Respondents Bear A Heavy Burden In A Facial Challenge To A State Statute In The Absence Of An Express Congressional Statement Of Intent To Preempt

The court below conceded that "Congress has not explicitly preempted Act 144." 801 F.2d at 233. In the absence of an express congressional statement of intent to preempt, there is no presumption of federal preemption. *See New York Department of Social Services v. Dublino*, 413 U.S. 405, 413 (1973).[4]

A state law may be implicitly preempted because "'[t]he scheme of Federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). But where "'the field that Congress is said to have pre-empted has been traditionally occupied by the States,'" there is a presumption "'that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985), *quoting Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Further, respondents have mounted a mere facial challenge to Act 144 without alleging a specific conflict between Act 144 and federal regulation. 627 F. Supp. at 930. This Court has made clear that a facial challenge on preemption grounds will fail if the state regulatory scheme is not in actual conflict with the federal law. *See California Coastal Comm'n v. Granite Rock Co.*, —— U.S. ——, 107 S.Ct. 1419, 1431-32 (1987). A "hypothetical possibility" of conflict between state and federal law will not suffice. *See Arkansas Electric Cooperative v. Arkansas Public Service Comm'n* ("*Arkansas*"), 461 U.S. 375, 395 (1983). Therefore, where "it is entirely possible for entities to comply with both the [federal statute] and the [state statute], the state statute can be pre-empted only if it frustrates the purposes of the federal law". *CTS Corp., supra*, slip op. at 8. Such frustration of purpose will be found if "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress', *Hines v. Davidowitz* [312 U.S. 52, 67 (1941)]." *Hillsborough County, supra*, 471 U.S. at 713. Accordingly, respondents bear an especially heavy burden in this case.

As we demonstrate below, the state regulatory scheme embodied in Act 144 is not expressly preempted but complements the federal regulatory scheme embodied in the Natural Gas Act. The States have traditionally regulated in this area, and the federal agency administering the allegedly preemptive statute has not previously stated that its authority (or Congress' decision to withhold such authority) precludes state regulation. In addition, no actual conflict between state and federal regulation exists as to approval of the issuance of securities. In short, Act 144 neither "interfere[s] with, [n]or [is] contrary to" federal law, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824), and therefore is not preempted.

[4] "Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was 'the clear and manifest purpose of Congress' would justify" the conclusion that a State lacks authority to regulate "in a manner consistent with pertinent federal laws." *De Canas v. Bica*, 424 U.S. 351, 357 (1976).

B. Analysis Of The Natural Gas Act, The Legislative History Of That Act, And FERC Implementation Reveals No Intent To Preempt State Securities Regulation

Preemption analysis "begin[s] with the language employed by Congress." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985); *see Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 205 (1983). The Natural Gas Act authorizes FERC to regulate "natural-gas companies," *see, e.g.*, 15 U.S.C. § 717c, d, and f, but it does not authorize FERC to regulate the issuance of securities by "natural-gas companies" or to limit state regulation of such issuances. Accordingly, in order to establish preemption, respondents must demonstrate that Congress implicitly intended to preempt state securities regulation or that an actual conflict exists between the state law and the federal law. Neither showing can be made.

1. *The regulatory scheme embodied in the Natural Gas Act does not include the issuance of securities by "natural-gas companies"*

(a) The Natural Gas Act was enacted to fill a gap between state and federal regulation of "natural-gas companies." The legislative history of the Act demonstrates clearly that the gap in regulation did not include the regulation of securities issuances.

The Natural Gas Act was a response to a series of cases in which this Court had decreed that

> the retail sale of gas was subject to state regulation, "even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies," *Missouri v. Kansas Gas Co.*, [265 U.S. 298,] 309, but that the wholesale

> sale of gas in interstate commerce was not subject to state regulation even though some of the gas being sold was produced within the State.

Arkansas, supra, 461 U.S. at 377-78. "This impotence of the states to act in relation to sales for resale by interstate carriers brought about the demand for federal regulation and Congress' response in the Natural Gas Act." *Panhandle Eastern Pipe Line Co. v. Indiana Public Service Comm'n*, 332 U.S. 507, 516 (1947).

The Natural Gas Act therefore reflects Congress' intent to regulate only those areas of the natural gas industry that the States were prohibited from regulating. "The Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other." *Federal Power Comm'n v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513 (1949) (footnotes omitted).

Before the enactment of the Natural Gas Act in 1938, States traditionally exercised the power to regulate the issuance of securities, including the securities of "natural-gas companies."[5] See Section 18 of the Securities Act of 1933, 15 U.S.C. § 77r. The legislative history clearly reveals that in enacting the Natural Gas Act, Congress did not intend to preclude the States from continuing the regulation of securities issuances by "natural-gas companies." See S. Rep. No. 1162, 75th Cong., 1st Sess. 2 (1937) ("The bill takes no authority from State Commissions, and so is drawn as to complement and in no manner usurp State regulatory authority, and contains

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[5] As the court of appeals noted, for example, Michigan enacted a predecessor to Act 144 in 1909. 801 F.2d at 233. *See also* N.Y. Pub. Serv. Law § 69 (McKinney 1955); Calif. Pub. Util. Code § 52 (Deering 1938); Pope's Digest of Ark. Stat. c. 36, § 2118 (1937); Pa. Stat. Ann. tit. 66, § 1241 *et seq.* (Purdon 1959).

provisions for cooperative action with State regulatory bodies").

Indeed, the longstanding state regulation in this area suggests that, if Congress had intended to preempt state laws that regulate securities of "natural-gas companies," it would have said so explicitly. *See CTS Corp. supra*, slip op. at 15-16 (longstanding state regulation of corporate directorships and shareholder voting rights held indicative of no congressional intent to preempt). There is simply no evidence that Congress intended to occupy the field of regulation of the gas industry to the extent of prohibiting state regulation of securities issuances by "natural-gas companies."

(b) To the contrary, the legislative history of the Natural Gas Act is replete with instances where Congress considered—and rejected—a more expansive regulatory scheme that specifically would have included federal regulation of securities issuances by "natural-gas companies." In 1935, three years before the enactment of the Natural Gas Act, the 74th Congress considered a comprehensive bill for the federal regulation of electric public utilities and natural gas companies, including the authority to regulate securities of gas companies. See H.R. 5423, 74th Cong., 1st Sess., Section 307 (1935). Although the provisions relating to public utilities were recast, reported out of House committee, and eventually enacted in amended form as the Public Utility Act of 1935, 15 U.S.C. § 79 *et seq.*, and 16 U.S.C. § 824 *et seq.*, the provisions relating to natural gas companies, including securities regulation, were deleted.[6]

When the Natural Gas Act was enacted in 1938, no mention was made of securities of "natural-gas companies" except for a conflict of interest provision not relevant here.[7] Thereafter, FERC repeatedly recommended that Congress amend Section 12 of that Act to grant the agency the authority to regulate the issuance of securities by "natural-gas companies." See, *e.g.*, 1954 FERC Annual Report, p. 169; 1958 FERC Annual Report, p. 17; 1959 FERC Annual Report, p. 201; 1973 FERC Annual Report, p. 7. Although bills were introduced in both the House and Senate to grant FERC such authority, none ever became law. *Ibid.*

"While [this Court is] correctly reluctant to draw inferences from the failure of Congress to act, it would, in this case, appear improper for [the Court] to give a reading to the Act that Congress considered and rejected." *Pacific Gas & Electric Co.*, *supra*, 461 U.S. at 220. The fact that Congress, both before and after passage of the Natural Gas Act in 1938, considered and rejected provisions that would have given the federal agency the authority over securities issuances, combined with the States' historic regulation of securities of "natural-gas companies," demonstrates that the Natural Gas Act cannot fairly be interpreted as precluding state regulation of such securities issuances.

2. *Regulation under Section 7 of the Natural Gas Act does not support a finding of implicit preemption*

Section 7 of the Natural Gas Act, cited by the court below, 801 F.2d at 235, does not require a different conclusion. Under Section 7, as amended in 1942, a "natural-gas company" must obtain a certificate of public convenience and necessity from FERC prior to "undertak[ing] the construction or extension of any facilities" to be used in the transportation or sale of natural gas sub-

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[6] See H.R. Rep. No. 1318, 74th Cong., 1st Sess. 1 (1935); see also Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess., Parts I-III (1935); *Dairyland Power Coop.*, 37 FPC 365, 369 n.2 (1963) (dissent of Comm. Morgan).

[7] Section 12 of the Act prohibits an officer or director of a "natural-gas company" from receiving anything of value in consideration for "the negotiation, hypothecation, or sale by such natural-gas company of any security issued, or to be issued . . . ." 15 U.S.C. § 717k.

ject to FERC jurisdiction. 15 U.S.C. § 717f(c)(1)(A). FERC has "the power to attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e).

In fulfilling its responsibilities under Section 7, FERC may "scrutinize the financial set-up," H.R. Rep. No. 1290, 77th Cong., 2d Sess. 2-3 (1942), and "examine costs, finances, necessity, feasibility, and adequacy of proposed services," S. Rep. No. 948, 77th Cong., 2d Sess. 2 (1942). As this Court has noted, "[Section 7] requires the Commission to evaluate *all* factors bearing on the public interest," *Atlantic Refining Co.*, *supra*, 360 U.S. at 391 (emphasis added), and grants the Commission "the power to lay down conditions precedent to the entry of natural gas into interstate commerce." *Federal Power Comm'n v. Hunt*, 376 U.S. 515, 526 (1964).

FERC's conditioning authority to "scrutinize" and "examine" construction financing plans does not, however, encompass the authority to regulate the issuance of securities. Section 7 confers no authority to regulate matters not otherwise subject to the agency's jurisdiction under the Natural Gas Act. *See Federal Power Comm'n v. Panhandle Eastern Pipe Line Co.*, *supra*, 337 U.S. at 507-08 (FERC cannot use its Section 7 certificate authority to block a transfer of production properties over which FERC has no jurisdiction). *See also NAACP v. FPC*, 425 U.S. 662, 666 n.4 (1976). Thus, the FERC cannot legally prevent a "natural-gas company" from issuing any particular securities.

The information required by FERC regulations is limited to assisting FERC in performing its duty under Section 7 to ensure that the applicant is "able and willing properly to do the acts and to perform the service proposed" as required by Section 7(e) of the Act. 15 U.S.C. § 717f(e). *See ANR Storage Company*, *supra*, 8 FERC at 61,206. In a Section 7 proceeding, FERC must approve an "initial rate" for the proposed new service. *See Federal Power Comm'n v. Hunt*, *supra*, 376 U.S. at 521. The financial information that must be filed by the applicant for a Section 7 certificate assists FERC in determining whether a proposed initial rate is in the public interest. *See, e.g., ANR Storage Co.*, *supra*, 8 FERC at pp. 61,198, 61,200-01. The specific concerns of the State, on the other hand, are both broader than and different from FERC's interest. The State's interests are to guard against financial failure of the company and harm to gas customers from overcapitalization (see district court decision below, 627 F. Supp. at 928); the State's review encompasses securities that may not be directly related to gas pipeline construction or to an extension of gas service.

Moreover, nowhere in the FERC's regulations implementing Section 7, 18 C.F.R. § 157.5 *et seq.*, does FERC provide that the States are prohibited from regulating securities issuances of "natural-gas companies." In sum, FERC's role in implementing Section 7 of the Natural Gas Act provides no basis for limiting state regulation of securities of "natural-gas companies."

C. The Absence Of Conflict Between Federal And State Regulation Further Supports A Determination That No Federal Preemption Exists Here

The principal concern of the court below was that Act 144 "presents at least the possibility of a conflict between federal and state regulation." 801 F.2d at 235. Although a conflict between complementary statutes is always a theoretical possibility, respondents have yet to point to a single instance where a project proposed by a "natural-gas company" did not go forward because of state regulation of securities proposed by the company. Moreover, the history of the application of analogous public utility regulatory statutes, providing a far greater potential for federal-state conflicts, reveals that States assert their authority without conflicting with the federal regulatory scheme. The Court, in these regulatory settings, has re-

fused to find preemption where, as here, there was a mere "hypothetical" conflict or where the rationale for state action was not directly related to the purpose of the federal scheme.

1. *State regulation and the Rural Electrification Act*

This Court has noted that "it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility. No state relies solely on its own resources in this respect." *FERC v. Mississippi*, 456 U.S. 742, 757 (1982).

FERC had previously determined that the federal Rural Electrification Act, 7 U.S.C. § 901 *et seq.*, gave wholesale electricity ratemaking authority over rural electric cooperatives to the Rural Electrification Administration ("REA") and, therefore, the cooperatives are not subject to Federal Power Act regulation. *See Salt River Project v. Federal Power Comm'n*, 391 F.2d 470 (D.C. Cir. 1968). In *Arkansas*, *supra*, the Court found that the REA had not exercised its ratemaking authority under the Rural Electrification Act and thus did not expressly preempt the States from regulating the wholesale rates of rural electric cooperatives. The Court refused to assume that a "hypothetical event" in the form of a possible action by the State which might "seriously compromise important federal interests" is "so likely to occur as to preclude [state authority to act] at all." 461 U.S. at 388-89.

Arkansas presented the Court with a stronger argument for federal preemption than the instant case. Unlike *Arkansas*, this case does not involve a federal agency that possesses the authority to regulate in the disputed area. Thus, federal action cannot possibly create a conflict with Act 144.[8]

[8] The court below also gave considerable weight to FERC's certificate conditioning authority under Section 7 of the Natural Gas Act, which it found "at least implicitly, regulates [the] financing plans" for construction of natural gas facilities. 801 F.2d at 234. Yet this conditioning authority is less pervasive in the area of financing than the activities of the REA were in *Arkansas*. The REA actually lends funds to the regulated entities and has a legitimate interest in ensuring that those entities will be able to repay those funds. 461 U.S. at 385-86, 389. FERC, on the other hand, has no direct interest in the financing of a particular "natural-gas company" project. FERC's requirement that a financing plan be filed simply assures that the "natural-gas company" has a plan to pay for the facilities and that the initial rate for the proposed new service is reasonable. Thus, the state regulatory scheme in this case is less intrusive than a similar scheme which the Court has previously found was not preempted.

2. *State regulation and the Atomic Energy Act*

A second area of potential conflict between federal and state regulatory schemes for electric public utilities concerns the regulation of nuclear-powered generating plants. Under the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.*, Congress created a "complex scheme to promote the civilian development of nuclear energy, while seeking to safeguard the public and the environment from the unpredictable risks of a new technology." *Pacific Gas & Electric Co.*, *supra*, 461 U.S. at 194. The Nuclear Regulatory Commission ("NRC"), which administers the Atomic Energy Act, was given exclusive jurisdiction "with respect to regulation of the construction and operation" of nuclear plants, *id.* at 209, in order to safeguard the public against the hazards of radiation. *Id.* at 210.

Notwithstanding this exclusive federal jurisdiction over the licensing of the construction and operation of nuclear plants, the Court in *Pacific Gas & Electric* held that the Atomic Energy Act did not preempt a California law that effectively prevented the construction of a nuclear plant that was already licensed by the NRC. The Court based its determination on the facts that (1) the purpose of the state statute, concern about the cost of nuclear waste disposal, was not related to the protection of the public

against radiation hazards, *id.* at 213-16; (2) compliance with both the state and federal statutes was possible, *id.* at 219; and (3) the state statute "does not seek to regulate the construction or operation of a nuclear powerplant." *Id.* at 212.

Similarly, with respect to Act 144 in the instant case, (1) the purpose of the state statute is unrelated to the construction and operation of natural gas facilities which are the express concerns of Section 7 of the Natural Gas Act; (2) compliance with both the state and federal statutes is not only possible but has been effected in practice for many years; and (3) the state statute does not purport to regulate any area that is within the express authority of FERC under the Natural Gas Act.

Furthermore, the effect on the federal scheme from a mere possibility that Michigan, at some future date, might alter its historic practice under Act 144 and deliberately undermine a FERC decision authorizing construction of a gas project pales in comparison with the effect of the state statute considered in *Pacific Gas & Electric* under which, "[u]nless certification is granted, the proposed plant cannot be constructed." 461 U.S. at 197 n.7. If the California statute upheld in *Pacific Gas & Electric* did not "undercut a federal objective", *id.* at 223, neither does Act 144, for it is far less intrusive to the federal regulatory scheme.

D. Preemption Of State Regulation Of The Issuance Of Securities Of "Natural-Gas Companies" Would Create A Regulatory Gap Inconsistent With Congressional Intent

The decision of the court below, if allowed to stand, would disrupt the complementary relationship between state and federal regulation of "natural-gas companies" by creating a gap in the regulatory structure. Under the court's decision, neither FERC nor the States would regulate the issuance of securities by "natural-gas companies."

The Natural Gas Act, however, was intended to eliminate, not create, gaps in state and federal regulation. Through the Natural Gas Act, "Congress 'meant to create a comprehensive and effective regulatory scheme' . . . so that there would be no 'gaps' for private interests to subvert the public welfare." *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972) (citation omitted).

As we previously noted, *supra*, p. 15, States have interests that are different from those of FERC even where the proposed securities directly relate to construction of natural gas facilities. Assuming, *arguendo*, that FERC has some authority to regulate securities specifically related to construction projects approved in Section 7 certificate proceedings, preemption of state regulation under Act 144 sweeps much too broadly. As a result of the decision below, States would not simply be prohibited from regulating the issuance of long-term securities specifically related to construction projects proposed by "natural-gas companies" in the Section 7 certificate proceedings. The court's decision would also preclude state regulation of long-term securities that are not in any way related to construction projects subject to FERC Section 7 jurisdiction.

The practical effect of the decision below is that "natural-gas companies" would be able to use vital assets dedicated to the public service as collateral to raise funds through the unregulated issuance of securities for purposes that are totally unrelated to gas company service obligations, *e.g.*, takeovers of other companies, the development of shopping centers, or the acquisition of baseball teams. This Court has recognized that regulatory oversight of "natural-gas companies" is critical to prevent private interests from subverting the public welfare. *See FPC v. Louisiana Power & Light Co., supra*, 406 U.S. at 631. State regulation of securities of natural gas companies predates federal regulation under the Natural Gas Act and demonstrates that the States are well-suited to protect gas ratepayers from potential abuse by gas com-

panies through the issuance of securities. *See Michigan Gas Storage Co. v. Michigan Public Service Comm'n*, 275 N.W. 2d 457 (Mich. 1979).

The court below attempted to justify the regulatory gap it would create by finding that Congress, in enacting the Natural Gas Act, meant to occupy the entire field of natural gas regulation. 801 F.2d at 233-34. For this finding, the court below relied on this Court's decision in *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi* ("*Transco*"), 474 U.S. 409, 106 S. Ct. 709 (1986).

Transco is inapposite here. *Transco* involved not only the Natural Gas Act, but also the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. § 3301 *et seq.* The issue in *Transco* was whether the NGPA's repeal of FERC's long-standing authority over natural gas wellhead sales under the Natural Gas Act permitted the States to fill the regulatory gap by regulating such sales. The Court held that, in enacting the NGPA, Congress eliminated the Natural Gas Act authority over wellhead sales in order to establish a market-oriented policy toward these sales, thus precluding state regulation. 474 U.S. at ——, 106 S. Ct. at 716-17. In the instant case, however, the federal agency never had jurisdiction over the issuance of securities. In addition, no new federal legislation has established any policy, much less a market-oriented policy, toward securities issuances by "natural-gas companies". Thus, unlike *Transco*, the decision below has failed to advance a single public policy rationale to support the conclusion that *no one* may regulate the securities issuances of "natural-gas companies."

II. ACT 144 SATISFIES THE STANDARD FOR VALID STATE ACTION UNDER THE COMMERCE CLAUSE

In recent years, the Court has generally employed the balancing test enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), to determine whether a state law or action violates the Commerce Clause:

> Where [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142. *See Brown-Forman Distillers Corp. v. New York State Liquor Authority*, —— U.S. ——, 106 S. Ct. 2080, 2084 (1986); *Arkansas, supra*, 461 U.S. at 393-94. Michigan Act 144 clearly satisfies this standard and is therefore valid under the Commerce Clause.[9]

A. Respondents Have A Substantial Presence In Michigan And Act 144 Is A Legitimate Response To This Presence

Respondents are particularly ill-situated to raise a Commerce Clause challenge to Act 144. Respondents and their parent company all have their principal offices in

[9] *Amici* have previously argued that the "balancing" component of the *Pike v. Bruce Church* standard that measures whether the burden on interstate commerce imposed by a state statute "is clearly excessive in relation to the putative local benefits" is inappropriate and should be discarded. *See* Brief of the National Governors' Association, *et al.*, as *amici curiae* in *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi*, No. 84-1076. *Amici* point to the concurring opinion of Justice Scalia in *CTS Corp. v. Dynamics Corp. of America*, No. 86-71 (U.S. April 21, 1987), which supports this position. Undertaking such an analysis of the potential excessiveness of state action in meeting a legitimate state problem (akin to a determination whether the penalty fits the crime) places the Court in the untenable position of having to make political decisions. This policymaking function rightly belongs to the legislative and executive branches, not to the courts. Although, as we demonstrate, Act 144 unquestionably satisfies the *Pike v. Bruce Church* test, *amici* believe that the standard for Commerce Clause analysis should be reconsidered.

Detroit, Michigan. Over 50% of Pipeline's sales are in Michigan. Thousands of Michigan consumers of natural gas receive their gas supply indirectly from Pipeline. Storage was incorporated under the laws of Michigan. Virtually all of its gas storage reservoirs are located in the State.

As the district court explained, two decisions of Michigan's highest court found that Act 144 was enacted to confront "the evils and injurious effects on the public of overcapitalization" and to "protect interests which rate regulation alone could not effectively control." 627 F.Supp. at 931.[10] Act 144 also "serves the interests of both the investors in, and creditors of, a company organized and operating and issuing securities under the law of [Michigan] and those of ratepayers in efficient and uninterrupted service at reasonable rates." *Ibid.*

These interests are demonstrably of legitimate concern to Michigan gas ratepayers, investors, and creditors, and are in no way diminished simply because the law furthering these interests 'necessarily affect[s] certain aspects of interstate commerce." *CTS Corp., supra*, slip op. at 19.

B. The Burden Imposed On Interstate Commerce By Act 144 Is Not Excessive In Relation To Local Benefits

As previously discussed, Michigan and other States have historically regulated the securities of "natural-gas companies" operating within their borders. The Natural Gas Act was enacted in large part to complement this historic state regulation by eliminating the "gap" in regulation of interstate sales and transportation. *See supra*, pp. 10-12. Act 144 is designed to allow review of a gas company's proposals for security issuances only to

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[10] Citing *Michigan Gas Storage Co. v. Michigan Public Service Comm'n*, 275 N.W. 2d 457 (Mich. 1979), and *Indiana & Michigan Power Co. v. State of Michigan*, 275 N.W. 2d 450 (Mich. 1979).

ensure that ratepayers, investors, and creditors in Michigan are not adversely affected.

Act 144 does not prohibit or conflict with any activity of FERC, which is charged with regulating in complementary fashion other activities of "natural-gas companies." The Act does not purport to regulate the rates, services, construction activities, or operations of "natural-gas companies." Congress' failure to give FERC the authority to approve the security issuances of "natural-gas companies" indicates Congress' lack of concern that state regulation of securities will impose an improper burden on interstate operations of "natural-gas companies." Any effect of Act 144 on interstate natural gas operations would be only incidental.

1. The court below was concerned with the burden that multiple regulation of the securities issuances of a single entity might place on interstate commerce. 801 F.2d at 237-38. The record below reveals that no such burden has yet surfaced. In addition, there is a long history of multi-state jurisdiction over approval of securities issuances under the analogous statutory scheme for electric public utilities. Under that scheme, States have routinely regulated securities issuances of public utilities without harm to the interstate character of their operations.

The Federal Power Act, which FERC also administers, requires every public utility to seek FERC authorization prior to the issuance of any security or assumption of any liability,[11] unless that public utility is organized and

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[11] Section 204(a), 16 U.S.C. § 824c(a): "No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order if it finds that such issue or assumption

operating in a State which regulates the utility's security issues.[12] Under this approach, a single issue of securities by a utility operating in more than one State may be subject to pre-approval by two or more States. Despite the potential for conflict among the States, the historic operation of this regulatory scheme has not resulted in chaos, substantial delay, or an excessive burden on interstate commerce. Many electric utilities comply with the regulatory requirements of more than one State for securities issuances without harm to their interstate operations. These utilities include, *e.g.*, Delmarva Power & Light Company, Duke Power Company, Carolina Power & Light Company, Washington Water Power Company, and Pacific Power & Light Company.[13]

(a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes."

[12] Section 204(f), 16 U.S.C. § 824c(f): "The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission."

[13] Delmarva Power & Light Company must obtain approval from the Delaware Public Service Commission, Del. Code Ann. tit. 26 § 215(a)(2) (Supp. 1986), and the Virginia State Corporation Commission, Va. Code § 56-56 (1986).

Duke Power Company and Carolina Power & Light Company must obtain approval from the North Carolina Utilities Commission, N.C. Gen. Stat. § 62-161(1982), and the South Carolina Public Service Commission, S.C. Code Ann. § 58-27-1710 (Law. Co-op. 1976).

Washington Water Power Company must obtain the approval of the Washington Utilities and Transportation Commission, Wash. Rev. Code Ann. § 80.08.040 (1962), and the Idaho Public Utilities Commission, Idaho Code § 61-901 (1976).

Pacific Power & Light Company must obtain approval from five commissions: the Washington Utilities and Transportation

Of course, the federal-state statutory schemes under the Federal Power Act and the Natural Gas Act are not identical. Nonetheless, it is clear that Congress, under the Federal Power Act, as under the Natural Gas Act, intended to fill a regulatory gap. *Arkansas*, *supra*, 461 U.S. at 378-79. Under the Federal Power Act, Congress filled the gap by having FERC step in where the States chose not to regulate securities. Under the Natural Gas Act, Congress filled the gap by allowing the States to continue their historic practice of regulating securities issuances.

Congress was willing to allow the States to regulate securities issuances even in the area of transactions in electric energy where "it is difficult to conceive of a more basic element of interstate commerce." *FERC v. Mississippi*, *supra*, 456 U.S. at 757. Surely, Congress' failure to assert federal authority over security issuances by an industry whose interstate character is less pervasive than that of electric utilities is conclusive of Congress' view that state regulation would not unduly burden interstate commerce.

2. The court below relied on *Brown-Forman Distillers Corp. supra*, in concluding that Act 144 imposed an impermissible burden on interstate commerce. That case is clearly distinguishable.[14]

Commission, the Idaho Public Utilities Commission, the Wyoming Public Service Commission, Wyo. Stat. Ann. § 37-6-101 (1977), the Montana Public Service Commission, Mont. Code Ann. § 69-3-501 (1985), and the Oregon Public Utility Commissioner, Or. Rev. Stat. § 757.405 (1985). The company was exempted from securities regulation under § 816 of the California Public Utilities Act, Cal. Pub. Util. Code § 816 (Deering 1970), by the California Public Utilities Commission in 1975. *See Pacific Power & Light Co.*, PUC Decision No. 84286 (Calif. April 1, 1975).

[14] The court below also relied on an Illinois appellate court decision in *United Air Lines, Inc. v. Illinois Commerce Comm'n*, 207 N.E. 2d 433 (Ill. 1965) agreeing with that court that "the

In *Brown-Forman*, the Court found that the state law on its face violated the Commerce Clause because it directly regulated interstate commerce. The Court in *Brown-Forman* was troubled that a New York statute had extraterritorial effect, which could oust other States from exercising their legitimate rights to control prices of goods sold within their borders. 106 S. Ct. at 2086-88. The "practical effect" of the state law was to control prices of goods in other States. *Id.* at 2086.

In this case, the court below did not find that Act 144 had extraterritorial effect. Rather, the court summarily found a Commerce Clause violation based upon the law's effect on interstate commerce. The court below concluded that Act 144 also directly regulates interstate commerce simply because the securities to be approved "may be used to finance a project in another State." 801 F.2d at 236.

The flaw in this holding is that the Commerce Clause does not preclude an action of one State simply because it might be felt in another. *See Arkansas*, *supra*, 461 U.S. at 395. Almost every state statute will have some spillover effect on interstate commerce. Rather, the test is whether the effect on interstate commerce creates a

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burdens of expense, delay and administrative hassle" in having to comply with the state statute outweighed any benefits to the state of having the entity comply with it. 801 F.2d at 237-38. Again, this case is distinguishable, as the district court's opinion demonstrates. First, whereas United Airlines had less than one percent of its route miles and less than one percent of its property in the state, 50% of Pipeline sales and nearly 100% of Storage property are in Michigan. 627 F.Supp. at 933. Second, the district court reiterated that "substantial, legitimate state interests are served by Act 144 regulation," *id.* at 934, referring to its earlier discussion of Michigan appellate decisions that found the statute to benefit Michigan ratepayers, investors and creditors. *Id.* at 931. In sum, the vastly greater involvement of respondents in the lives and livelihoods of Michigan citizens clearly distinguishes this case from *United*.

burden that is excessive in light of legitimate local concerns. *See Pike v. Bruce Church*, *supra*, 397 U.S. at 142. The court below disparaged the local concerns that led to Act 144's enactment and, in contravention of the balancing test established by the Court, failed to weigh these concerns against the incidental effects on interstate commerce from application of that Act.

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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May 8, 1987

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAY 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHIGAN PUBLIC SERVICE COMMISSIONERS ERIC J. SCHNEIDEWIND, EDWYNA G. ANDERSON and MATTHEW E. McLOGAN,

Petitioners,

v.

ANR PIPELINE COMPANY and ANR STORAGE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF THE MICHIGAN PUBLIC SERVICE COMMISSIONERS

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INTEREST OF AMICUS CURIAE

The National Association of Regulatory Utility Commissioners (NARUC) files this brief as *amicus curiae,* urging reversal due to the substantial harm an affirmance of the decision below will have upon the effectiveness of the regulation of utilities by its member State regulatory commissions. The NARUC files this brief with the written consent of the Petitioners and the Respondents.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of utilities and carriers. The Michigan Public Service Commissioners (MPSC), Petitioners herein, are members of the NARUC. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating natural gas and electric utility companies operating within their respective borders. As such, these officials have the obligation to assure the establishment and operation of utility companies which serve the public interest. This means that State commissions, constituted as creatures of their respective legislatures, must seek to ensure that dependable and safe utility service is provided consumers at rates which are just, reasonable and nondiscriminatory.

In this case, the U.S. Court of Appeals for the Sixth Circuit has upheld a facial challenge to the Michigan Public Utility Securities Law, 1909 P.A. 144, M.C.L.460.301 *et seq.* (Act 144), on the grounds that this statute – which requires Respondents ANR Pipeline Company and ANR Storage Company to obtain the approval of the MPSC to issue long-term securities – (1) is preempted by the Natural Gas Act (15 U.S.C. 717 *et seq.*) (NGA), and (2) violates the "dormant" Commerce Clause. As the MPSC described in its petition for certiorari filed in this proceeding on December 12, 1986, 41 States in addition to Michigan regulate the securities of public utilities.[1] The Sixth Circuit

[1] MPSC Petition at 22, citing *1984 Annual Report of National Association of Regulatory Utility Commissioners*, pp. 521-525 (Washington, D.C. 1985).

decision, *ANR Pipeline Co. et al. v. Schneidewind et al.*, 801 F.2d 228 (6th Cir. 1986),[2] therefore calls into question the jurisdiction of these 41 States to continue utility securities regulation, particularly when the utility involved operates in more than one State.

As a result, the resolution of the issues raised in this case will affect State regulatory authorities nationwide. Further, this Court's exposition herein of preemption and Commerce Clause doctrine will reach beyond the securities issue directly raised, potentially affecting State utility regulation more broadly. Therefore, the NARUC's interest in protecting the regulatory authority of its members is strong, compelling its participation in the case at bar.

SUMMARY OF ARGUMENT

In its decision herein under review, the Court of Appeals reversed the decision of the United States District Court for the Western District of Michigan, Southern Division[3] which found that Act 144 on its face neither was preempted by the authority given the Federal Energy Regulatory Commission (FERC) under the NGA, nor was violative of the restrictions placed upon State actions by the Commerce Clause of the Constitution.[4] In so doing, the Court of Appeals held that first, while Congress had not explicitly preempted the operation of State laws such as Act 144, its enactment of the NGA, "implicitly displaced" the

[2] The decision appears at Appendix A (A1-A21) to the MPSC Petition for *certiorari*. Subsequent reference will be made to the decision as it appears therein in this form. App. at ____.

[3] *ANR Pipeline Co., et al. v. Schneidewind et al.*, 627 F.Supp. 923 (W.D. Mich. 1985). This decision appears at Appendix B (B1-B24) to the MPSC petition for certiorari.

[4] Art. I, Sec. 8, Cl. 3.

State law. On the Commerce Clause issue, the Court below held that Act 144 does not pass muster under the balancing of interests test described by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) because the local benefits of the statute do not outweigh the burdens it places on interstate commerce.

In support of the MPSC and its individual members, the NARUC respectfully submits that the Court of Appeals erred as to both issues. Concerning preemption of Act 144 by the NGA: Last month, in a case involving, *inter alia,* preemption of State regulation of corporate securities, this Court restated its longstanding rules of preemption analysis. Where Congress has not explicitly preempted State action, and where it is possible for parties, such as Respondents, ANR Pipeline Company and ANR Storage Company, to comply with both Federal and State laws, "the State statute can be preempted only if it frustrates the purposes of the Federal law." *CTS Corporation v. Dynamics Corporation of America,* 55 U.S.L.W. 4478, 4480 (April 21, 1987) ("CTS"). In this case, it is undisputed that Congress has not explicitly preempted State laws such as Act 144, while Respondents own actions prove that it is not impossible to comply with both Act 144 and the NGA. Therefore, the only remaining question is whether Act 144 "frustrates" the goals of the NGA. Contrary to the Court of Appeals' decision, State laws such as Act 144 supplement federal regulation of natural gas pipeline companies such as ANR as the Congress intended when it passed the NGA. Simply put, there is no conflict between the State and Federal statutes. Both use different means to reach the same goal – protection of public utility consumers and investors.

Turning to the Commerce Clause issue: In its recent *CTS* decision, the Court recounted the various tests that

State legislation must meet to withstand dormant Commerce Clause attack. 55 U.S.L.W. at 4482-4484. As a threshold matter, the State law must not discriminate against interstate commerce, *Id.*, at 4483, nor may it subject interstate actions to inconsistent regulation by different States. *Id.* Having passed these thresholds, the State enactment must be then subjected to a balancing test to determine if its burdensome effects on interstate commerce are outweighed by local benefits. *Id.* at 4483-4484. The Court of Appeals erroneously held, contrary to the specific findings of the District Court, that Act 144 failed the balancing test. In so doing, the Court improperly ignored the important benefits of the State statute while overstating the burdens the law imposed on interstate commerce.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT ACT 144 WAS PREEMPTED BY THE NATURAL GAS ACT.

In recent years, the Court has been called upon to decide a number of claims that certain aspects of State regulation of utilities and carriers were implicitly preempted by various Federal programs. *Louisiana Public Service Commission v. FCC,* 475 U.S. ____, 90 L.Ed.2d 369 (1986) (State-dictated depreciation rules for telephone utilities are not implicitly preempted by differing rules established by the Federal Communications Commission); *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. ____, 85 L.Ed.2d 36 (1985) (State decisions to accept collective intrastate motor carrier rate proposals do not violate federal antitrust laws in the absence of Congress' explicit intention to limit State regulation of intrastate commerce); *Arkansas Electric Cooperative Corporation v.*

Arkansas Public Service Commission, 461 U.S. 374 (1983) (State regulation of rural electric generating and transmission cooperatives not implicitly preempted by Federal loan requirements for REA borrowers); *Pacific Gas and Electric Company v. State Energy Resource Conservation and Development Commission,* 461 U.S. 190 (1983) (State moratorium on new nuclear power plant construction not implicitly preempted by Federal regulation of nuclear plant safety). These cases document the Court's general reluctance to find that Congressional silence requires that State utility regulation – "one of the most important of the functions traditionally associated with the police power of the States," *Arkansas Electric Cooperative, supra,* 461 U.S. at 377 – must give way. While these cases turned in some degree on their respective facts, and while the analyses varied, in each case the Court found that in the absence of specific Federal legislation preempting the State regulatory program at issue, the proponents of preemption bore a heavy burden of proof that Congress in fact intended to displace longstanding State regulatory programs.

In the case at bar, it is undisputed that Congress had not, by its enactment of the NGA or any other statute, explicitly preempted State laws such as Act 144. App. at A10. At best, the Court of Appeals could find that Congress "implicitly determined" that such State laws should not be imposed upon natural gas companies also subject to FERC jurisdiction under the NGA. App. at A11. Respectfully, the NARUC submits that the Court of Appeals preemption analysis is flawed, particularly in light of the extensive and detailed findings of the District Court, and therefore, cannot stand.

The Court of Appeals based its conclusion of facial preemption of Act 144 on two independent findings: first,

that since the Congress' natural gas enactments formed a "comprehensive" natural gas policy, and since Congress had not addressed the question of utility securities regulation, it must have implicitly intended that such activities not be regulated by governmental bodies at any level. App. at A11. Second, the Court of Appeals offered hypothetical examples of ways in which Act 144 might potentially conflict with the FERC's jurisdiction to review financing plans under the NGA in the limited context of its issuance of certificates of public convenience and necessity for new pipeline construction. App. at A12-A16.

Paraphrasing the Court's holding in *CTS,* Act 144 can be preempted only if it frustrates the purposes of the NGA. 55 U.S.L.W. at 4480. Neither of the Court of Appeals' findings meets this standard. On the question of preemption through nonregulation, the Court below cited this Court's language in *Arkansas Electric Cooperative, supra,* 461 U.S. at 384, that a "federal decision to forego regulation" implies a congressional intent that no one regulate a given area. App. at A11. The Court below reasoned that since Congress has not enacted an "advance approval" statute of its own for natural gas companies' securities, no State may.

The problems with the Court's reasoning are readily apparent. The Court can cite no evidence that any Federal actor, either the Congress or the FERC, had ever made an affirmative decision to forego regulation in this area. By contrast, this Court in *Arkansas Electric Cooperative,* upon which the Court of Appeals relied, specifically found that the Federal Power Commission had affirmatively decided that the agency would not assert jurisdiction over rural cooperatives. 461 U.S. at 384, citing *Dairyland Power Cooperative,* 37 FPC 12, 67 PUR3d 340 (1967).

The Court concluded that the FPC's decision that Congress did not intend that it regulate rural cooperatives "did not determine" that these utilities should go unregulated. *Id.*

So it is here. There is simply no evidence that by not giving FERC (the successor to the FPC) the authority given the MPSC by Act 144, Congress consciously chose, as a matter of policy, that gas company securities be unregulated. Moreover, the Court of Appeals, in its discussion of preemption through nonregulation, completely overlooked this Court's understanding that Congress' primary purpose in passing the NGA was to aid in making State regulation effective. "The [NGA] was drawn with meticulous regard for the continued exercise of State power, not to handicap or dilute it in any way." *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana,* 332 U.S. 507, 517-518 (1947). This construction of the NGA removes any doubt that Congress, by withholding authority from the Federal government, did not intend to supplant then-existing State laws such as Act 144. Therefore, the holding of the Court below on this point must be rejected.

As must the Court of Appeals' second justification for implied preemption: that Act 144, on its face, creates the "imminent possibility" that a decision of the FERC to certificate new pipeline construction and a decision of the MPSC regulating Respondents' securities will conflict. App. at A12-A16. The first answer to this claim is that it ignores the careful findings of the District Court that the MPSC's expeditious implementation of Act 144 has, as a matter of fact, not been "potentially disruptive of or an obstacle to execution of the full objectives of the Federal regulatory scheme." App. at B13. Rather, the District

Court found the State statute to be sufficiently flexible, and FERC's securities jurisdiction, if any, sufficiently narrow to permit the two levels of government to complement each other without interference. App. at B14-B15. Indeed the District Court properly found (*Id.*) that this Court's opinion in *Arkansas Electric Cooperative* disposes of the Court of Appeals' fear of imminent State/Federal conflict: "We will not, however, in this facial challenge at the [Arkansas] PSC's mere assertion of jurisdiction, assume that such a hypothetical event is to likely to occur . . ." 461 U.S. at 389. The case at bar involves a similar facial challenge to a State commission's assertion of jurisdiction to regulate, and therefore, the hypothetical "conflicts" advanced by the Court below must be rejected as a basis for preemption.

The Court of Appeals' logic is flawed for an additional reason. Under the Court's own reasoning, State/Federal conflicts are possible only when FERC conducts certificate proceedings. App. at A12-A16. Yet, Act 144 operates in much broader terrain, resulting in the regulation of securities issuances regardless of the purpose of the funds raised. By striking Act 144 on its face and not as applied, the Court of Appeals has in effect used the NGA to create a "regulatory gap" in which securities transactions unrelated to FERC certificate proceedings are deregulated.

The purpose of the enactment of the NGA, however, was to close gaps in regulation, not to free gas companies from preexisting State laws such as Act 144:

> It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the

> import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption. Yet this, in effect, is what appellant asks us to do.
>
> *Panhandle Eastern Pipeline Co., supra,* 332 U.S. at 519.

The Court of Appeals has reached this "incongruous result" as well, rendering the MPSC less capable of regulation than before the NGA's adoption. As a result, its hypothetical findings of an "imminent possibility" of conflict must be rejected and its decision must be reversed.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT ACT 144 VIOLATED THE COMMERCE CLAUSE.

In its recent decision in *CTS, supra,* The Court reaffirmed its basic analysis for determining whether State laws violate the "dormant" Commerce Clause: if the State statute at issue does not violate the threshold tests of discrimination or inconsistency, the law will stand if its local benefits outweigh its burdens on interstate commerce. 55 U.S.L.W. at 4482-4484. In the case at bar, neither the Court of Appeals nor the District Court found that Act 144 discriminates against interstate commerce or forces utilities subject to its provisions to comply with inconsistent regulation in other States. Therefore, the sole remaining issue is whether the benefits attributable to Act 144 exceed any burden it may place on interstate commerce.

This balancing test is generally traced to the Court's decision in *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970), and in the specific context of utility regulation, *Arkansas Electric Cooperative, supra,* 461 U.S. at 389,

where the Court explicitly abandoned the mechanical, "bright line" jurisprudence of earlier decisions. In *Arkansas Electric Cooperative,* as in *CTS,* the Court concluded that the benefits of nondiscriminatory, consistently applied State laws outweighed any interstate burdens.

As did the District Court in this litigation. App. at B16-24. However, the Court of Appeals rejected the District Court's careful weighing of the effects of Act 144, finding instead that State interests were not effectively served by the statute and were not "important," and that courts in other States had found similar statutes unconstitutionally burdensome. App. at A17-A21. In so doing, the Court of Appeals rejected the Supreme Court of Michigan's conclusion, in *Michigan Gas Storage v. Public Service Commission,* 405 Mich. 376, 275 N.W.2d 457 (1979) that Act 144 provided substantial benefits to the State's gas consumers and investors. *Id.* at A18.

The Court should reject the Court of Appeals' revision of the District Court's benefit/burden calculus for at least the following reasons.[5] The Court below found the benefits of Act 144 nonexistent due to FERC's certification authority. App. at A19. But as we have seen, *supra,* at 9-10, FERC's authority is not as extensive as MPSC's under Act 144. Therefore, the MPSC can prevent the

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[5] And perhaps the Court should also adopt a simple non-discrimination/inconsistency analysis in these cases and abandon the balancing test entirely. As Justice Scalia commented in *CTS,* the balancing analysis necessarily requires Federal courts to make difficult and inherently subjective decisions about which State interests are worthy, and which State laws are effective. This case, in which two Federal courts have reviewed the same record and reached opposite conclusions, is a good example of the arbitrariness anticipated by Justice Scalia. *CTS, supra,* 55 U.S.L.W. at 4485 (Scalia, J. concurring in part and concurring in the judgment).

"evils of over-capitalization" in situations where FERC has no jurisdiction to act.

In addition, the District Court found, App. at B19, that Act 144 provides important safety benefits to the citizens of Michigan, a point the Court of Appeals chose not to address. App. at A19. Indeed, throughout its discussion of the benefits of Act 144, the Court of Appeals lost sight of this Court's strong admonition in *Arkansas Electric Cooperative, supra,* that the regulation of electric utilities "is one of the most important of the functions traditionally associated with the police power of the States." 461 U.S. at 377. In sum, the Court of Appeals' apparent hostility to State utility regulation cannot be squared with the care this Court has taken to preserve the States' authority in this important area.

On the "burdens" side of the equation, the Court of Appeals completely ignored the factual findings of the District Court that the MPSC's administration of Act 144 has not been unduly burdensome. App. at A19-A21. Rather than focus on the District Court's careful analysis of the limited effect Act 144 has had on Respondents' operations (App. at B21-B23), the Court below found that because other State courts had struck similar statutes, Act 144 must fail as well. Yet, as the District Court found, these cases[6] are readily distinguishable from the case at bar, primarily due to the minimal contacts the airline companies had with the respective States. App. at B22. By contrast, as the District Court found, Respondents' contacts with Michigan are substantial, a fact which weighs heavily in the application of the balance-of-interest test. *Arkansas*

[6]E.g., *United Air Lines, Inc. v. Nebraska State Railway Commission,* 172 Neb. 784, 112 N.W.2d 414 (1961); and *United Air Lines, Inc. v. Illinois Commerce Commission,* 32 Ill.2d 516, 207 N.E.2d 433 (1965).

Electric Cooperative, supra, 461 U.S. at 394. The Court of Appeals' disregard for these important differences is symptomatic of the overall casualness with which it applied the balance of interest test. As a result, we respectfully submit that the decision below must be reversed.

CONCLUSION

For the reasons stated herein, the NARUC respectfully requests that the decision of the Court of Appeals be reversed.

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Supreme Court, U.S.
FILED
JUL 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHIGAN PUBLIC SERVICE COMMISSIONERS
ERIC J. SCHNEIDEWIND, EDWYNA G. ANDERSON
AND MATTHEW E. McLOGAN,

Petitioners,

V.

ANR PIPELINE COMPANY AND
ANR STORAGE COMPANY,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, SUPPORTING AFFIRMANCE

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NO. 86-986

IN THE
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OCTOBER TERM, 1986

MICHIGAN PUBLIC SERVICE COMMISSIONERS
ERIC J. SCHNEIDEWIND, EDWYNA G. ANDERSON
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ANR PIPELINE COMPANY AND
ANR STORAGE COMPANY,

Respondents.

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, SUPPORTING AFFIRMANCE

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm. Its goals include enhancement of the market system of resource allocation, the attainment of a better balance between the federal government and the states, and the preservation of a rational system of criminal justice. In support of these goals, LFA has appeared as amicus curiae in the United States Supreme Court, in the federal courts of appeals, in the federal district courts, and in the courts of various states. All litigation undertaken by LFA is approved by its Board of Directors, the majority of whom are attorneys.

SUMMARY OF ARGUMENT

This case cannot be resolved by simply arguing that securities regulation should be left to the states, since the state's justifications for the regulation have emphasized the location of facilities and natural gas sales, rather than merely sales of securities. Therefore, a full analysis of preemption and commerce clause issues is necessary.

The Court of Appeals correctly found federal preemption of the Michigan Act since the Act regulates in an area already comprehensively regulated by a federal agency acting under congressionally delegated authority. The court's finding of a per se violation of the commerce clause is proper due to Michigan's "projection" of its legislation into other states. Further, the court correctly found an unconstitutional burden on interstate commerce by balancing state interests which are "incidental" or are easily served in ways less disruptive to interstate commerce against the clearly excessive burden on interstate commerce caused by potentially inconsistent and onerous state regulations.

ARGUMENT

I. SINCE MICHIGAN'S BASIS FOR REGULATION IS NOT MERELY SALES OF SECURITIES, BUT EMPHASIZES RESPONDENTS' INTERSTATE NATURAL GAS BUSINESS, A FULL PREEMPTION AND COMMERCE CLAUSE ANALYSIS IS NECESSARY IN THIS CASE.

Petitioners attack the decision below by arguing that the regulation involved in this case is securities regulation, which is appropriately left to the state, rather than natural gas regulation, which is the province of the Federal Energy Regulatory Commission. The argument does not hold up under scrutiny.

An examination of the facts of this case, and the statute involved, indicates that the state is regulating in this instance not because securities are being sold in Michigan, but because the company has facilities in Michigan, and does a certain amount of

business there. The District Court and the Petitioners make much of the fact of the physical location of facilities in Michigan and the amount of sales made in Michigan. Furthermore, the statute itself excepts from its application any firm deriving less than five percent (5%) of its revenues from natural gas operations within the state. If the concern were with the sale of securities within the state, it would seem to make no difference that five percent, or even fifty percent, of the operations were within the state, and, in fact, the state would have the same interest in regulating the sale of securities for companies conducting *no* business in the state.[1] In Michigan, for example, the function of "traditional" securities regulation is served by a separate "blue sky" regulation which protects local investors with regard to sales of securities in Michigan. Mich. Stat. Ann. secs. 19.776(101), *et seq.*

Since the focus of the District Court, the Petitioners, and the Michigan precedents, *see, e.g., Western Union Telegraph Co. v. Public Service Comm'n, supra,* note 1; *Michigan Gas Storage Co. v. Public Service Comm'n,* 275 N.W.2d 457 (Mich. 1979), *Indiana and Michigan Power Co. v. Michigan,* 275 N.W.2d 450 (Mich. 1979), has been on the location of facilities and sales, the case cannot be resolved by the argument that securities regulation is appropriately left to the states.[2] Rather, it is necessary to make a full analysis of the preemption and commerce clause issues.

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1 The Court of Appeals of Michigan was unwilling to accept such a result in *Western Union Telegraph Co. v. Public Service Comm'n,* 338 N.W.2d 731 (Mich. App. 1983) in which it found that application of the same state statute unconstitutionally burdened interstate commerce where the percentage of business in Michigan was "very small." *Id.* at 735-36. Yet there is really no more reason to allow state jurisdiction here than there was in that case, at least if the state's interest concerns sales of securities.

2 As Respondent points out in its Brief in Opposition at 6-7, such "advance approval" regulation is inherently different from "traditional disclosure-based securities regulation," as several other courts have held, and is therefore not the type of securities regulation traditionally left to the states.

II. THE COURT BELOW CORRECTLY FOUND THAT THE MICHIGAN ACT IS PREEMPTED BY THE NATURAL GAS ACT AND CONSTITUTES AN UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE.

A. The Court Below Properly Applied Precedents of This Court in Finding That the Michigan Act is Preempted by the Natural Gas Act.

Petitioners argue that a finding of preemption is not possible under the tests summarized in *Louisiana Public Service Comm'n v. Federal Communications Comm'n*, 106 S.Ct. 1890, 1898 (1986). Petition for Writ of Certiorari at 10. Yet it is clear that such a finding is not only possible under the authority of that case, but in fact is the only logical finding. Clearly, Congress has "legislated comprehensively" in this area, creating an "implicit . . . barrier to state regulation." *Id.*

As the Court held in *Louisiana PSC*, the preemption may result from regulation by "a federal agency acting within the scope of its congressionally delegated authority." *Id.* Here, the FERC has acted within the scope of its authority in approving projects and the underlying financing plans under 15 U.S.C. sec. 717f(e). If the state reserves the right to reject a project or its financing, even under "advance approval" legislation, it is clearly entering into an area already regulated by the federal government, and it sets up an "imminent possibility of collision" between the state regulation and the federal authority. *Maryland v. Louisiana*, 451 U.S. 725 (1981), *cited in ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228, 234 (6th Cir. 1986).

B. The Court Below Properly Found a Per Se Violation of the Commerce Clause by Michigan's "Projection" of Its Legislation Into Other States.

Petitioners' attack on the Court of Appeals' finding of a per se violation of the commerce clause under this Court's analysis in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S.Ct. 2080, 2084 (1986) is inapposite, since the

court's finding is based, not on "imaginary facts," as Petitioner suggests, *see* Brief of Petitioners at 34, but on an explicit requirement for "advance approval" for issuance of securities, "the proceeds of which may be used to finance a project in another State." *ANR Pipeline, supra*, at 236.

As this Court pointed out in *Brown-Forman*, forcing a business "to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce." 106 S.Ct. at 2086, *citing Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality opinion), and one state "may not 'project its legislation into [other States].' " 106 S.Ct. at 2086, *quoting Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935).

C. The Court Below Properly Found an Unconstitutional Burden on Interstate Commerce in This Case.

The Court of Appeals did not stop with its finding of a per se violation of the commerce clause, but additionally applied the second tier of the *Brown-Forman* analysis, 106 S.Ct. at 2084, the *Bruce Church* balancing approach. This approach, set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), requires a balancing of the extent of the burden on interstate commerce and the nature of the local interest involved. Petitioners virtually ignore the Court of Appeals' application of this balancing test, praising the District Court for having "thoroughly analyzed" the facts and having reached the right conclusion. Brief of Petitioners at 39. On analysis, however, the District Court's justifications for "advance approval" legislation are insufficient when considered against commerce clause considerations.

The District Court concluded that the state has an interest in protecting customers (and others who deal with Respondent) against problems of overcapitalization. As the Court of Appeals pointed out, however, the FERC exercises control in this area. *ANR Pipeline*, 801 F.2d at 237. Furthermore, the mere assertion that a company has customers in any given state cannot give that state authority over any and all business decisions which might impact on its financial integrity and that therefore may indirectly

"impact on" the state. *See ANR Pipeline Co. v. Schneidewind*, 627 F.Supp. 923, 932 (W.D. Mich. 1985). Any such impact, here, would be clearly "incidental" compared to the "clearly excessive" burden on interstate commerce, within the meaning of *Bruce Church*, 397 U.S. at 142, discussed below.

The District Court's further argument that inadequate financing "may result in inadequate maintenance of these intrastate facilities, thereby posing potential safety threats to those living and working at or near plaintiffs' [Respondents'] facilities," *ANR Pipeline*, 627 F.Supp. at 932, is even more tenuous. In addition to the foregoing reasons, this argument must fail for the reason that it is clearly within the state's authority to enact appropriate *safety* regulations to protect against this result, *see Pike v. Bruce Church* at 143, *citing Southern Pacific Co. v. Arizona*, 325 U.S. 761, 796 (1945). This kind of state regulation is the preferred approach under *Bruce Church*, because it has a "lesser impact on interstate activities." 397 U.S. at 142.

Balanced against these tenuous "state interests" is a substantial burden on interstate commerce. In fact, the District Court did not even correctly apply the Michigan precedents in its examination of this question. The court cites *Michigan Gas Storage, supra*, and *Indiana and Michigan Power, supra*, as supporting its decision, due to the "strong Michigan connections" in all of these cases. *ANR Pipeline*, 627 F.Supp. at 932. Yet, as Respondents point out, the cases are distinguishable in that the former involved a company which was located and operated *solely* in Michigan, and the latter did not involve the Natural Gas Act. *See* Brief in Opposition at 10-11. Further, the Court of Appeals of Michigan more recently found the Michigan Act to be an unconstitutional burden on interstate commerce in a similar case. *Western Union Telegraph Co. v. Public Service Comm'n*, 338 N.W.2d 731 (Mich. App. 1983). The reasons given by the court all apply to this case: even an expedited procedure will cause some delay in the issuance of securities, each request costs money that adds up in the aggregate even if individual amounts are small, and application of the Act allows potential disapproval of "a nationwide securities issue for reasons germane only to Michigan." *Id.* at 734-35. This burden is to be considered in view of the fact that 49 other jurisdictions plus the SEC and other federal agencies could potentially exercise like authority. *Id.* at 735. Although the potential number of other states that could exercise the authority asserted under this statute is in fact probably limited to 19, due to the fact that the Act does not apply if less than 5% of the volume of sales occur in a given state, the potential disruption is nonetheless substantial.

A plurality of this Court recognized the potential disruption of interstate commerce due to conflicting regulations in its plurality opinion in *Edgar v. MITE Corp., supra*, in which it pointed out that "if Illinois may impose such regulations, so may other States; and interstate commerce . . . would be thoroughly stifled." 457 U.S. at 642.

The Court plurality further stated:

> While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders. Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law.

Id. at 644. The same argument applies to the case at hand.

The substantial nature of the burden on interstate commerce further is demonstrated by *CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637 (1987). Although the Court found that the statute involved in that case did not violate the Commerce Clause, the reasons given indicate that under the facts of this case, a violation would be found. The *CTS* Court found two important "threshold reasons" for finding unconstitutionality under the Commerce Clause to be lacking in that case. *Id.* at 1649. Yet the second of the two reasons, the possibility of an

adverse effect on "interstate commerce by subjecting activities to inconsistent regulation," *id.*, clearly applies here. Therefore, this case is controlled by *Edgar v. MITE* rather than by *CTS Corp.*

CONCLUSION

A full preemption and commerce clause analysis is necessary in this case, and such an analysis indicates that the Michigan Act, as applied in this case, is preempted by the Natural Gas Act and violates the commerce clause of the Constitution. Therefore, the decision of the Court of Appeals should be affirmed.

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BRIEF

(9)

Supreme Court, U.S.
FILED
JUL 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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July 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-986

MICHIGAN PUBLIC SERVICE COMMISSIONERS ERIC J. SCHNEIDEWIND, EDWYNA G. ANDERSON and MATTHEW E. MCLOGAN,
Petitioners,

v.

ANR PIPELINE COMPANY and ANR STORAGE COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

In accordance with this Court's Rule 36, the Interstate Natural Gas Association of America ("INGAA") has received the written consent of the parties to file this brief as Amicus Curiae. Copies of the consents have been filed with the Clerk.

INTEREST OF THE AMICUS CURIAE

INGAA is a nonprofit national association whose members represent virtually all of the major interstate natural gas transmission companies operating in the United States. INGAA's members account for over 90% of all natural gas transported and sold for resale in interstate commerce. Appendix A to this brief lists 45 major inter-

state pipelines, most of which are members of INGAA or affiliates of members. The companies indicated serve an average of six states. However, individual companies, such as Tennessee Gas Pipeline Company and Transcontinental Gas Pipeline Corporation, serve as many as 18 different states. INGAA's members provide interstate wholesale service in a total of 47 of the 48 continental states, excluding Vermont. The map on pages 20 and 21 of the Joint Appendix ("J.A.") graphically illustrates the breadth of national coverage represented by the interstate natural gas pipeline network. Rates and services in connection with the transportation and wholesale sales of gas in interstate commerce conducted by INGAA's members, who are natural gas companies,[1] are subject to exclusive regulation under the Natural Gas Act of 1938, 15 U.S.C. §§ 717-717z (1982 & Supp. III 1985) ("NGA"), and the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1982 & Supp. III 1985) ("NGPA").

Act 144[2] permits Michigan to control ANR Pipeline Company's ("ANR Pipeline") and ANR Storage Company's ("ANR Storage") access to virtually all of the capital necessary to finance, construct and operate the facilities needed for their interstate natural gas operations.[3] The statute applies to a natural gas company

[1] The term "natural gas company" is defined in the NGA as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." 15 U.S.C. § 717a(6) (1982). The term "wholesale", when used in this brief, is synonymous with the phrase "sale . . . for resale" in § 717a(6).

[2] Michigan Public Utilities Securities Act, 1909 P.A. 144 (codified at MICH. COMP. LAWS ANN. §§ 460.301-303 (West 1967 & Supp. 1987)).

[3] Act 144 requires advance approval of the securities issues of "a corporation, association, or individual exercising or claiming the right to carry or transport natural gas for public use, directly or indirectly . . . by or through a pipeline or engaged in the business of piping or transporting natural gas for public use, directly or indirectly, or engaged in the business of purchasing natural gas for distribution. . . ." Act 144, MICH. COMP. LAWS ANN. § 460.301(1). Act 144 exempts from its coverage a corporation "engaged in the business of carrying, transporting, piping, purchasing for distribution, or selling natural gas" into Michigan that derives less than 5% of its consolidated gross revenues from all of its operations from natural gas operations in Michigan and which does not offer residential natural gas service to the general public under rules promulgated by the Michigan Public Service Commission. Act 144, MICH. COMP. LAWS ANN. § 460.301(8). There are limited exceptions, largely relating to short-term securities. Act 144, MICH. COMP. LAWS ANN. § 460.301(4).

even if the company in question, such as ANR Pipeline, is not incorporated in Michigan and makes no retail sales in Michigan, so long as it derives five percent of its gross revenues from natural gas operations within Michigan. Michigan asserts the power to restrict the issuance of securities by those companies within its purview in both the interstate and international securities markets.

The question before this Court is whether states like Michigan can restrain the flow of capital needed by interstate pipelines to construct and operate facilities, as well as to perform other necessary services, in any one of the several states in the union. A ruling announcing such a principle for one state presumably would stand equally for any other state. The implications of such a holding would constitute a serious impediment to operation of the interstate natural gas network that INGAA's members represent.

SUMMARY OF ARGUMENT

The State of Michigan attempts to pigeonhole this case within the rubric of garden variety, state-administered "securities" regulation, suggesting that such regulation is one traditionally and properly within the states' province. That is not an accurate description of the statute,

because, by its terms, it is directed to companies performing utility functions, including transporters of natural gas or purchasers of gas for resale. Thus, the fundamental issue in this case is whether a state constitutionally can restrict the financing capability of interstate natural gas companies so as to govern the wholesale rates and reliability of service that these companies provide. Michigan is unable to identify any interest of Michigan investors in natural gas companies protected by Act 144 that is separate and distinct from their interest as consumers in the rates and services of those companies.

By seeking to regulate activity beyond the borders of Michigan, a statute like Act 144 is *per se* invalid under the Commerce Clause. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, —— U.S. ——, 106 S. Ct. 2080, 2084 (1986). Natural gas companies subject to Act 144 are required to obtain the prior approval of the Michigan Public Service Commission ("MPSC") before issuing securities in the national and international markets, regardless of whether the facilities financed by those securities are located entirely out of state, and regardless of whether those securities are destined for the portfolios of in-state investors.

Even assuming that Act 144 did not directly interfere with interstate commerce, the statute nevertheless fails the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). A state's interest in protecting in-state investors from "unlawful" security issuances or "overcapitalized" corporations can be met through its Blue Sky laws, the federal securities laws, or the state's intervention and active participation in proceedings before the Federal Energy Regulatory Commission ("FERC" or "Commission")[4] governing interstate companies' wholesale rates and facilities.

[4] The Federal Power Commission ("FPC") was the predecessor agency to the FERC.

Such state action also invades the area of regulation consigned exclusively to federal oversight. The NGA was enacted in direct response to this Court's conclusion that, under the Commerce Clause, the states could not legitimately enforce statutes that sought to regulate the sale of natural gas for resale in interstate commerce. *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924). The NGA subsequently brought the transportation and wholesale sales of natural gas companies under comprehensive federal regulation. Michigan's self-described mission in enforcing Act 144 is to govern the financial decisions of companies conducting utility operations, including interstate pipelines, as these decisions affect the rates and reliability of these companies' services. Such oversight rests within the exclusive province of the FERC.

Petitioner[5] suggests otherwise by focusing the argument on the formal vehicle used to achieve such governance at the state level—"securities" approval—and claims that the NGA provides FERC no express authority to approve the securities of companies within its oversight. Regardless of whether the form of Act 144 is "securities" regulation, however, the substantive result is utility regulation. No express congressional grant of authority is required to indicate that utility regulation of interstate gas companies' wholesale operations rests exclusively in the federal arena. Not a single one of either ANR Pipeline's or ANR Storage's activities gives rise directly to any local gas consumer interest that is traditionally within the ambit of state regulation, and the State would not have been free to exercise "securities" regulation over such interstate transactions at wholesale even before passage of the NGA.

Nor has Petitioner surfaced any evidence from legislative histories to show that merely because Congress did

[5] This brief refers to Michigan Public Service Commissioners Schneidewind, Anderson and McLogan jointly as "Petitioner."

not grant a more express form of securities approval authority to FERC, Congress intended the states to engage in utility regulation of wholesale interstate companies, whether by governance of their securities or in any other manner. Thus, Act 144 reaches beyond the boundaries of permissible state regulation set by the Commerce and Supremacy Clauses of the U.S. Constitution.

ARGUMENT

I. DESPITE THE STATE'S DESCRIPTION OF ACT 144 AS "SECURITIES REGULATION," ITS THRUST AND EFFECT IS THE REGULATION OF TRANSMISSION AND SALES FOR RESALE OF NATURAL GAS IN INTERSTATE COMMERCE.

As the record below indicates, J.A. at 61-76, one hundred percent of the gas supply activities conducted both by ANR Pipeline and ANR Storage in Michigan are "wholesale" and interstate in character and, as such, are comprehensively regulated by the FERC, pursuant to the NGA and the NGPA. Yet, the MPSC seeks to require both Respondents to subject themselves to its jurisdiction under Act 144.

In this setting, Petitioner's references to Act 144 as a form of "securities" regulation, which allegedly "effectuates a legitimate local public interest as part of the state's police powers," Pet. Br. at 11, obscures the ultimate goal and effect of such legislation. Even though the MPSC has not purported to regulate directly the rates or other terms and conditions of the storage, transportation or sales activities at issue in this case, J.A. at 66, authority conferred over a company's right to issue securities for the financing and construction of projects or to carry out its other public utility missions constitutes regulation of that company's most basic utility operations, not solely its "securities" activities.

A. The Purported Goal of Protecting Investors Is Illusory.

Act 144 is "aimed at protecting the public from the adverse effects that could arise due to overcapitalization, unscrupulous transactions or unlawful securities issuances." Pet. Br. at 36. The Michigan Supreme Court has asserted two different concerns relating to the "adverse effects" of such transactions: 1) protection of investors, and 2) protection of ratepayers within the state from the effect that the financial decisions of the utility have on their rates. *Kelley v. Pub. Serv. Comm'n*, 412 Mich. 385, 316 N.W.2d 187, 193 (1982). As the parties below stipulated, the amount of securities held by Michigan investors would never amount to "more than a small percentage of [Respondents'] outstanding securities." J.A. at 77. More striking, however, is that the form of blanket preissuance approval required by Act 144, covering vast quantities of securities that will be sold outside of the State, is not generally applied to all companies that operate in Michigan. Like many other states, Michigan maintains a "Blue Sky" law, administered by the Corporation and Securities Bureau within the Michigan Department of Commerce. Those laws govern the registration and sale of such securities to investors within that State. *See* MICH. COMP. LAWS ANN. §§ 451.701-818 (West 1967 & Supp. 1987). Blue Sky laws, as well as federal securities regulation, are aimed at protecting any investors located within a state against the securities abuses to which Petitioner claims Act 144 is directed. Pet. Br. at 36.

Act 144, by comparison, is directed *solely* at companies engaged in utility functions and is administered by the arm of the State charged with utility regulation. The preissuance approval required by such legislation ranges far beyond securities that would be sold to investors within Michigan, or securities to finance facilities located in Michigan. If such broad prior restraint were

necessary in order to protect the State's investors, there would be no reason for applying it only to companies performing utility functions, and exempting all other forms of business enterprise whose securities the State's investors might own. Thus, neither the interest to be protected nor the effect of Act 144 can be considered "securities regulation" as it is commonly understood.

B. The Primary Goal and Effect of Act 144 Is the Oversight of Financial Decisions of Companies Engaged in Utility Functions Insofar as Those Decisions May Affect the Companies' Rates and Reliability of Service.

Petitioner contends that Act 144 "looks primarily at the financial decisions of the utility, and not the need for underlying utility facilities being constructed with the funds, if it is a construction situation." Pet. Br. at 36. Michigan emphasizes the effect that such "financial" decisions have on ratepayers in ensuring "efficient and uninterrupted service at reasonable rates". Pet. Br. at 35 (*quoting Indiana & Michigan Power Co. v. MPSC*, 405 Mich. 376, 275 N.W.2d 450, 453 (1979)).

The intent of Act 144 is avodedly to "further[] the general interest of the citizenry in *efficient and reliable service* since the 'physical property of a company within the state, essential to the company's ultimate service to the public, could be jeopardized by inadequate financing, resulting in a failure in that service.'" Pet. Br. at 35 (emphasis added) (*quoting Michigan Gas Storage Co. v. MPSC*, 405 Mich. 376, 275 N.W.2d 457, 462 (1979)). The focus of Act 144 regulation is the pipeline's gas operations within the State, as it "supplies the peak winter requirements of its customers in Michigan . . . from its Michigan-operated storage fields . . . [and acting as] a primary natural gas supplier to Michigan. . . ." Pet. Br. at 38. As Petitioner summarizes, ANR Pipeline's "provision of natural gas to Michigan is integral to the state's economic well-being, and to its citizens . . . Respondents have a major and overwhelming presence in Michigan, operating facilities and conducting functions that integrally affect the public health, safety and welfare of Michigan's citizens." *Id.*

In short, utility regulation of the subject companies' rates, services and reliability is both the primary goal and effect of Act 144. Regardless of any interests a state maintains in the securities and utility operations of an intrastate company serving solely at retail within the state (a question not presented here), oversight of "the efficient and uninterrupted service" (Pet. Br. at 35) of the pipeline and storage operations of federally-certificated natural gas companies is that of the FERC.[6] This is not to suggest that these interstate matters are not important. To the contrary, reliable service at reasonable rates in the interstate gas market is of the utmost importance to the consuming public. That is precisely why these matters have been entrusted to a neutral federal arbiter that can maintain a national perspective on both the technical and policy questions involved.

II. ACT 144 IMPERMISSIBLY BURDENS INTERSTATE COMMERCE.

The test of whether a state statute impermissibly burdens interstate commerce[7] is twofold. Any state action

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[6] Both briefs of the *amici* supporting Petitioners confirm this fact. *Amicus* National Association of Regulatory Utilities Commissioners ("NARUC") assert their interest in the case as it relates to "dependable and safe *utility* service . . . at rates which are just, reasonable and nondiscriminatory." NARUC Br. at 2 (emphasis added). *Amici* Council of State Governments, *et al.*, note that the purpose of Act 144 is to protect "assets dedicated to the public service. . . ." State Governments Br. at 19.

[7] Regardless of any determination that might be made under preemption standards, it is appropriate to conduct a separate analysis of whether the form of regulation posed by statutes like Act 144 impermissibly burdens interstate commerce. *See, e.g.*,

that extends its hand to regulate directly, or to discriminate against, the flow of commerce across state borders is prohibited. *Brown-Forman*, 106 S. Ct. at 2084. Even when a statute's effects on interstate commerce are indirect, the Court will determine whether the state's interest is legitimate and whether the burden on interstate commerce clearly outweighs any putative local benefits. *Id. See also Pike v. Bruce Church*, 397 U.S. at 142.

A. Act 144 Directly Regulates the Issuance of Securities in Both Interstate and International Commerce.

The interstate pipeline industry relies heavily on both the national and international financial markets to issue and sell its securities. Statutes such as Act 144 would permit a state to impose a prior restraint on the issuance and sale of such securities in both other states and other countries, even though the state's own investors may hold only a minimal stake in such securities. *See, e.g.*, J.A. at 77. Indeed, statutes designed like Act 144 would apply even if, in a given case, in-state investors purchased none of the securities.

As observed in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), this form of direct regulation of the interstate flow of securities is to be distinguished "substantially from state blue-sky laws in that it directly regulates transactions which take place across state lines, even if

Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n, 772 F.2d 404, 414 (8th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S. Ct. 884 (1986) (any argument that federal securities laws permitted some state regulation of securities of an electric utility operating within state's borders would not insulate state commission's activity from commerce clause scrutiny). *See also New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982) (Section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b) (1982), did not permit state to restrict the flow of hydropower outside its borders, because that section is in no sense an affirmative grant of power to the states to burden commerce "in a manner which would otherwise not be permissible.")

wholly outside the State . . . ."[8] *Id.* at 641. (Plurality Opinion, Part V-A). "Insofar as the [state] law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." *Id.* at 644. (Opinion of the Court, Part V-B). Thus state laws like Act 144, which directly restrict the issuance and sale of securities far beyond Michigan's borders, may not stand. *Brown-Forman*, 106 S. Ct. at 2086.[9]

B. Act 144 Is Also Unconstitutional Under A Balancing Test.

In Part V-B of *Edgar v. MITE*, the Court struck down the Illinois statute in question under the balancing test of *Pike v. Bruce Church*:

> [E]ven when a statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests served by the statute. The most obvious burden the Illinois Act imposes on interstate commerce arises from the statute's previously described nationwide reach which purports to give Illinois the power to determine whether a tender offer may proceed anywhere.

457 U.S. at 643. Act 144 similarly purports to give Michigan "nationwide reach" to determine whether both ANR Pipeline and ANR Storage may issue securities

[8] Blue Sky laws have been upheld where they only regulate transactions (*e.g.*, sales of securities) occurring within the regulating states. *See, e.g., Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917). *See also Leroy v. Great Western United Corp.*, 443 U.S. 173, 182 n.13 (1979).

[9] Petitioner misplaces reliance on the Court's recent decision in *CTS Corp. v. Dynamics Corp. of America*, —— U.S. ——, 107 S. Ct. 1637 (1987). Pet. Br. at 20, 38, 40-41, 45. The "anti-takeover" statute upheld in that case applied only to corporations incorporated within that state. In fact, the Court reaffirmed the ruling in *Edgar v. MITE* that a state "securities" statute which, like Act 144, "applied as well to out-of-state corporations as to in-state corporations", would be barred. 107 S. Ct. at 1651.

anywhere in the county, and indeed anywhere in the world, even if those securities may be for purposes of constructing a project wholly outside of that State's borders. The very substantial burdens arising out of such imposition clearly outweigh the putative local interests enunciated by Michigan in this case.

1. ***The Burden Imposed Is Both Real and Substantial.***

Petitioner argues that any burden compliance with Act 144 poses is minimal, because companies can proceed with a project by using short-term securities while they await approval of longer-term issues. Pet. Br. at 39-40. The vast interstate gas network shown on the map in the Joint Appendix was not financed solely on the basis of short-term notes. Long-term securities are essential to achieving the stability of financing needed to underwrite projects of any significant scope, and to provide future cost certainty that cannot be afforded by short-term issues. Moreover, a delay of even several months in a volatile interest rate market can increase the costs of any securities that the state might ultimately approve. *See, e.g.*, J.A. at 69.

Petitioner also asserts that any burden arising out of Act 144 is minimal because the State promptly approves security issuances. On at least two occasions, however, the MPSC has notified the Respondents that it would not merely review, but would hold hearings on submitted applications. Delays that would ensue from such proceedings clearly interfere with the financings and, indeed, in both instances of record, the applications were withdrawn. J.A. at 68, 75. These direct effects on the companies' financial decisions constitute an immediate and tangible burden on those companies' interstate operations. The vigor with which Petitioner presses this case belies any intent by the MPSC to accept a passive role. Hence there is genuine reason for concern as to the impact that the State's regulation over interstate firms will have on the public served in other states.

These burdens would be substantial if Michigan were the only state that enacted and enforced such a statute. The likely result, however, is that other states will enact or activiate similar statutory schemes. *See American Trucking Associations, Inc. v. Pennsylvania Dept. of Revenue*, 55 U.S.L.W. 4988, 4993 (U.S. June 23, 1987). *See also Brown-Forman*, 106 S. Ct. at 2087. Thus before multistate pipelines could issue securities needed to construct additional facilities—or even a new storage facility located in a single state—they would be required to run the gauntlet of preissuance approval in all of the states in which they operate that applied such restraints,[10] each with its own specific inquiry as to the "lawfulness" of the securities or whether they were necessary for the lawful purposes of the project or storage facility. Rather than enhance services to consumers in any state, the likely result would be to impede significantly the provision of safe, reliable, and efficient service to the interstate market.

2. ***The State's Putative Local Interests Are Minimal and Are Adequately Protected by Other Means Short of Act 144.***

The State expresses two putative local interests in enforcing Act 144 against Respondents: protection of investors, and protection of ratepayers from the "financial decisions" of the utility company. As discussed above, Blue Sky laws and the federal securities laws are adequate to serve the first function. That Act 144 singles out utility securities for preissuance approval "is at variance with [the State's] asserted legislative purpose" to protect investors, "thus [undermining its] justification for the burdens the statute imposes on interstate com-

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[10] The Brief of *Amicus Curiae* NARUC notes at pp. 2-3 that 41 states, in addition to Michigan, regulate the securities of public utilities, some operating in more than one state. As Appendix A indicates, the interstate natural gas bulk transportation and sales network traverses 47 states.

merce." *Edgar v. MITE*, 457 U.S. at 644 (Opinion of the Court, V-B).

As to any protection of a state's residents as gas consumers, the NGA provides the "same substantive protections" that the state has invoked. *See Edgar v. MITE*, 457 U.S. at 644. The effects of the financial decisions of interstate pipelines on their rates and services are felt by a state's residents only indirectly, with FERC standing in between as a buffer. In this connection, the duty of FERC to oversee wholesale rates and reliability of service carries with it the mission to ensure that the end result to ultimate ratepayers is also protected. *Mississippi Industries v. FERC*, 808 F.2d 1525, 1543 (D.C. Cir.), *reh'g granted*, 814 F.2d 773 (D.C. Cir.) (*en banc*), *vacated, reversed and remanded on other grounds*, No. 85-1611, *et al.* (D.C. Cir. June 24, 1987).[11] As part of this federal regulatory framework, states have full and meaningful access to FERC to address any concerns they may have about the service reliability or rate impact of any financial decisions made by interstate pipelines and storage companies. Unlike other parties, state commissions are accorded the ability to intervene as of right in FERC proceedings. 18 C.F.R. § 385.214 (1987).

Thus the specified goals underlying the state law here are fulfilled by the FERC. In light of these federal protections, the State has articulated no necessity for the duplicative oversight of interstate utilities that Act 144 imposes.

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[11] Petitioners suggest that FERC oversight through certificate proceedings does not fully address state consumer interests, in that not all securities might be issued for projects requiring § 7(c) certification. Pet. Br. at 31-32. In fact, however, the majority of securities of INGAA's members have been issued to finance projects requiring certificates. Moreover, FERC protection of ratepayer interests against pipelines' "financial decisions" is fully provided not only through certification, but through ratemaking proceedings as well. *See* pp. 17-19, *infra*.

III. FEDERAL REGULATION OF INTERSTATE NATURAL GAS COMPANIES UNDER THE NATURAL GAS ACT PREEMPTS ACT 144.

A. The Purpose Of The Natural Gas Act Was To Fill The Regulatory Gap Resulting From The States' Lack Of Authority Under The Commerce Clause To Regulate The Transportation And Wholesale Sales Of Natural Gas In Interstate Commerce.

Prior to the enactment of the NGA in 1938, the Supreme Court had drawn a sharp line limiting state regulation of the sale for resale of gas received from out-of-state, both because of its interstate character and the need for "uniformity of regulation". *Missouri v. Kansas*, 265 U.S. at 310. State regulation could not foray into the wholesale interstate side of the dividing line, regardless of whether Congress had acted affirmatively. *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 90 (1963); *Missouri v. Kansas*, 265 U.S. at 308.

1. *FERC's Regulation of The Interstate Activities of Companies Subject to Its Jurisdiction Is Comprehensive and Exclusive.*

Congress closed the regulatory gap by enacting "a comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company.'" *Northern Natural*, 372 U.S. at 91 (*quoting Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682 (1954)). The Commission's authority over the natural gas industry was further expanded in some respects by the passage of the NGPA. *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi*, —— U.S. ——, 106 S. Ct. 709, 716 (1986). A major purpose of the NGPA was to facilitate further the flow of natural gas into the interstate market. *Id.*

The Court has reaffirmed only recently that the FERC's jurisdiction as to those natural gas transactions that are in interstate commerce is both comprehensive and exclusive. *Transcontinental Gas Pipe Line Corp.*, 106 S. Ct. at 715-18. "[W]hen congress has established an exclusive form of regulation, 'there can be no divided authority over interstate commerce'." *Arkansas Louisiana Gas Co. ("Arkla") v. Hall*, 453 U.S. 571, 580 (1981) (*quoting Missouri Pacific R. Co. v. Stroud*, 267 U.S. 404, 408 (1925)). *See also Northern Natural*, 372 U.S. at 90-93. *Cf. Nantahala Power and Light Co. v. Thornburg*, —— U.S. ——, 106 S. Ct. 2349, 2357 (1986) (analogous principle under the Federal Power Act, 16 U.S.C. §§ 791-828c (1982 & Supp. III 1985) ("FPA")). States may not either directly or indirectly seek to control these jurisdictional matters. *Arkla v. Hall*, 453 U.S. at 578-79; *Northern Natural*, 372 U.S. at 91.[12]

2. *In Regulating The Jurisdictional Activities of Natural Gas Companies, FERC's Consideration Includes The Financing of Natural Gas Companies To The Extent Necessary To Administer The Natural Gas Act.*

Petitioner attempts to frame the debate in this case as a question of whether FERC is expressly authorized to approve the issuance of securities under the NGA, thus suggesting that implicit preemption is somehow less effective than explicit preemption. *See, e.g.*, Pet. Br. at 14-21. Finding no such grant, Petitioner proceeds to the conclusion that states, therefore, are free to engage in

[12] Petitioner relies on *Arkansas Electric Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983), to argue that the NGA shows no intent "to exempt natural gas companies from state regulation with respect to other areas . . . ." Pet. Br. at 46. The issue in *Arkansas Electric Cooperative*, however, was whether a rural power cooperative, not subject to regulation under the FPA, could be regulated by the states consistent with the Rural Electrification Act. Here, there is no question that both gas companies are, in fact, regulated by the FERC under the NGA.

such regulation. The preemption analysis does not end, however, simply because the NGA does not grant the FERC preissuance jurisdiction over natural gas companies' securities. *Transcontinental*, 106 S. Ct. at 717. It is useful, therefore, to look to the manner in which the federal agency exercises its utility regulation over interstate natural gas companies.

When it acts under §§ 4, 5 and 7 of the NGA, 15 U.S.C. §§ 717c, 717d, and 717f (1982), FERC considers in detail the finances of natural gas companies as those finances affect rates, charges, and reliability of service. The Commission views this as consistent with the primary purpose of the NGA "to protect consumers . . . of natural gas companies." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

The Commission's function in certificating projects under § 7 of the NGA is to ensure that such projects are required by the public convenience and necessity, and will be carried out in a manner that will serve the public interest. Thus, an integral part of the Commission's review of certificate applications filed under § 7(c) of the NGA is the examination of the financing for the proposed facilities, and the Commission's regulations governing certificate applications require the filing with the application of information concerning the plans for financing the proposed facilities. 18 C.F.R. § 157.14 (a)(14) (1987).

Nor is this requirement merely cosmetic. In authorizing major expansions of the existing systems of interstate pipelines, the Commission has applied a long-standing practice of utilizing its certificate conditioning authority under § 7 (e) of the NGA to ensure that the financing plans for proposed facilities are consistent with the public interest. *See, e.g., Pacific Gas Transmission Co.*, 24 F.P.C. 134, 140 (1960) (Commission required company, prior to commencement of initial financing, to file a report of terms and condi-

tions of sale of each class of securities, which report was subject to approval of the Commission); *Arkansas Louisiana Gas Co.*, 47 F.P.C. 583, 587 (1972) (FPC required company to submit detailed financing plan for project and to defer construction pending Commission approval thereof); *Midwestern Gas Transmission Co.*, 21 F.P.C. 653, 656 (1959) (Commission imposed, as condition of certificate, a requirement that company pay no dividends on common stock until interim notes were converted into preferred stock, or the total long-term debt, including the notes, was reduced to 75 percent or less of the total capitalization).

More recently, the Commission has conditioned approval of project-financed undertakings so as to protect ratepayers in the event that the project proved to be unsuccessful. *See, e.g., Trailblazer Pipeline Co.*, 18 F.E.R.C. ¶ 61,244 at 61,503 (1982) (Certificate to go forward on a project-financed basis "conditioned on applicants' waiver of their right to apply for the recovery of their equity investment in this project should it fail, irrespective of whether such failure and abandonment occurs during the construction or operation of the pipeline."). *See also Ozark Gas Transmission System*, 16 F.E.R.C. ¶ 61,099 at 61,198 (1981) (In issuing § 7(c) certificate for construction and operation of pipeline, Commission approves "rate design that makes the project financing possible."); *Great Plains Gasification Associates, Successor to ANR Gasification Properties Co. and PGC Gasification Co.*, 9 F.E.R.C. ¶ 61,221 at 61,425-26 (1979) (Commission conditioned approval "of the recovery of both ongoing debt and equity, as well as the ultimate recovery of all debt and equity, . . . upon the sponsors' applying for and receiving Commission authorization for abandonment of the project prior to the initiation of service under the certificate.")

Similarly, an integral part of the Commission's role in determining the just and reasonable rates under §§ 4

and 5 of the NGA is the establishment of an allowable return on the company's investment. *Hope*, 320 U.S. at 603. In determining rates of return, the Commission of necessity examines the company's capital structure, including the extant debt/equity ratio. Where the actual equity ratio is such that the Commission would have to "prescribe anomalous rates of return in order to mitigate the effects on ratepayers of abnormally high equity ratios," the Commission will impute a reasonable capital structure to the company and establish a normal rate of return based on that hypothetical capital structure. *Alabama-Tennessee Natural Gas Co.*, 38 F.E.R.C. ¶ 61,251 at 61,849-50 (1987), *reh'g granted solely for purpose of further consideration*, (May 8, 1987) (not published).

In exercising its ratemaking and certificate authority, the Commission also considers the pipeline's financial integrity and its ability to provide reliable service to its existing and future customers, as well as the effect of its actions on the pipeline's competitors' financial stability. Those functions involve protection not only of gas consumers, but the striking of a balance between consumers and the company's investors. *Hope*, 320 U.S. at 603. *See also Southern Louisiana Area Rate Cases v. FPC*, 428 F.2d 407, 435 (5th Cir. 1970), *cert. denied*, 400 U.S. 950 (1971); *Home Gas Co. v. FPC*, 231 F.2d 253 (D.C. Cir.), *cert. denied*, 352 U.S. 831 (1956). FERC also has an obligation under § 12 of the NGA, 15 U.S.C. § 717k (1982), to ensure that officers and directors of natural-gas companies do not illegally profit from any security issued.

Thus, while the FERC does not have preissuance authority over securities of interstate natural gas companies, through exercise of its express regulatory responsibilities, FERC considers the financial undertakings of natural gas companies, including whether they are under- or overcapitalized, as necessary to oversee the effects that

those financial undertakings have on gas consumers. As the language in Part I of this Brief demonstrates, it is that type of oversight that Act 144 attempts to achieve when it inquires into the securities issued by a company regulated by FERC. As such, Act 144 trenches directly on a field regulated exclusively by FERC, and cannot stand.

B. Act 144 Frustrates the Operation of the Federal Regulatory Scheme.

Act 144 also is preempted under the conflict analysis set forth in *Transcontinental* and *Northern Natural*. Statutes like Act 144 frustrate the operation of the federal regulatory scheme in several ways. The application of such statutes "disturbs the uniformity of the federal scheme, since interstate pipelines will be forced to comply with varied state regulations of their" security issuances. *Transcontinental*, 106 S. Ct. at 717. In such a case, "the desirability of uniform federal regulation is abundantly clear." *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 634-35 (1972). Moreover, delays in financing and the attendant delays in construction resulting from the need to comply with state statutes of this character "would have the effect of increasing the ultimate price to consumers." *Transcontinental*, 106 S. Ct. at 717. *See, e.g.*, Stipulated facts in J.A. at 69.

Third, Act 144 and similar state statutes can also place pipeline companies subject to their provisions at a disadvantage vis-a-vis their competitors who are not subject to state laws requiring prior approval of security issuances, at a time when FERC has interpreted its charge under the NGPA to increase competition among pipelines. *See Associated Gas Distributors v. FERC*, No. 85-1811, slip op. at 23, 31, 32 (D.C. Cir. June 23, 1987).

FERC findings in a certificate proceeding providing that a project is required by the public convenience and

necessity would also be thwarted by a state determination that the proposed securities for financing the project were not "necessary." Thus, a state order restricting access to the necessary capital for construction of a project that the federal authority ruled was necessary "easily could destroy the effectiveness of the federal act." *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 164 (1946). Unless the state has no real interest in meaningfully regulating securities issues, this conflict is imminent. If interstate pipelines that traverse several states can be required to obtain prior approval of their security issues in all of those states, the potential for conflict increases still more.

Even if protection of a state's investors (as distinct from utility regulation) were the only goal that the state had in mind in enforcing a law like Act 144, the result would still be preempted. State law may not frustrate the operation of federal law simply because the state legislature in passing the law had some purpose in mind other than causing such a result. *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971).

C. The Legislative History of the Natural Gas Act Does Not Support A Conclusion That Congress Intended the States to Regulate The Securities of Natural Gas Companies Exclusively Engaged In the Transportation and Sale of Gas in Interstate Commerce.

1. Legislative History of The Natural Gas Act Refutes Petitioner's Argument That The States Were Regulating Natural Gas Company Securities In 1938 and That Congress Intended to Preserve Such Existing State Authority.

Petitioner argues that "the NGA does not expressly grant FERC the authority to regulate natural gas company securities precisely because this regulatory power was already being exercised by the states when the NGA was passed." Pet. Br. at 17. *See also* State Governments

Br. at 11; NARUC Br. at 8. The legislative history of the NGA, however, lends no support to these blanket assertions, and Petitioner's brief is devoid of any direct support for this proposition. To the contrary, the natural gas industry was in its infancy in 1938 and, in large measure, had developed free from any state regulation. Col. William T. Chantland, attorney in charge of Legal Work for the Federal Trade Commission Utilities Investigation, summarized that situation in his testimony:

> This recent rapid expansion from a local to a national industry explains why the whole subject is so lacking in regulation. Until quite recently even the big producing States had little or no regulation. As in some other matters, State efforts have received setbacks at the hands of the courts, and laws have had to be revamped and retested. Nor has this all been completed.

Hearings on H.R. 11662 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess. 50 (1936) [1936 Hearings]. In fact, NARUC characterized the "business of transmission and sale of gas in interstate commerce at wholesale for resale" at that time as "wholly unregulated". 1936 Hearings at 85. With one exception, the state statutes cited by *Amici* Council of State Governments, *et al.* (Br. at 11 n.5) appear to have been enacted *after* 1938, thereby lending no support to their argument as to the regulatory actions of the states prior to 1938. In any event, any evidence that the states had in fact attempted to regulate the securities of natural gas companies prior to the NGA cannot compel a finding that such action was within the proper scope of state authority under the Commerce Clause, if such activity would transgress the holding of *Missouri v. Kansas*. If anything, the substantial expansion of the interstate natural gas network since that time has created even greater potential for such a state statute to have adverse effects on commerce. *Cf. Pacific Gas*

& Electric Co. v. State Energy Resources Conservation & Dev. Commn, 461 U.S. 190, 207-08 (1983).

Testimony on the scope of existing state regulation in the 1950's further indicates that any extant state securities regulation encompassed companies predominantly engaged in local gas distribution with a significant state presence. In 1950, a Subcommittee of the House Committee on Interstate and Foreign Commerce held hearings on H.R. 5306, which would have amended § 12 of the NGA to require natural gas companies to seek prior Commission approval for securities issues. As one of the industry witnesses indicated at the hearings:

> [I]n general these State Commissions who have the power by statute to regulate gas companies' securities *do so only when there is some local business done.* As a matter of comity *or as a matter of constitutional power,* some of the States—and I know of one in particular—do not exert security regulatory powers over a natural gas company which does no local business therein and merely transports gas across the State in interstate commerce.[13]

Similarly, the FPC Chairman testified that, in general, the securities of natural gas pipelines engaged in interstate commerce were not subject to state regulation:

> A different situation is that some of the newer and longer pipeline systems—such as Texas Eastern, Tennessee, El Paso, and Transcontinental—none of whose securities has been subject to any regulatory commission control—State or Federal—and to which only the so-called blue sky laws apply. Therefore, there is no valid reason for objection on the part of the State commissions to the exclusive occupancy of this field by the Federal regulatory commission so

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[13] *Hearings on H.R. 5306 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 81st Cong., 2d Sess. 64 (1950) (emphasis added) ["1950 Hearings"].

long as their own jurisdiction in respect of *matters of essentially local concern* is fully protected.[14]

During the 1950 hearings, NARUC recommended that H.R. 5306 be amended to include an exemption substantially identical to § 204(f) of the FPA, 16 U.S.C. § 824c (f) (1982), to the effect that "the provisions of this section shall not extend to a natural-gas company organized and operating in a State under the laws of which its security issues are regulated by a State commission." [15] The FPC opposed this proposed amendment, because "it would preclude Federal jurisdiction over any far-flung interstate natural-gas pipe-line system which operates in the State of its incorporation if that State should regulate its securities." [16] In the FPC's view, electric utilities and natural gas pipelines have "far different physical and operating characteristics," such that the amendment proposed by NARUC would be inappropriate in the context of the NGA.[17] Instead, the Chairman suggested that any such exemption allowing state approval of a utility's security issuances apply *only to a person operating within only one state, and where none of its rates were subject to regulation by the Commission.*[18] NARUC and the FPC were able to agree on the desirability of an exemption provision for the purpose of providing for state securities regulation only with respect to those companies "predomi-

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[14] *Id.* at 24 (emphasis added). In fact, the Chairman of the New York State Public Service Commission also testified: "I would like to make it clear that the New York commission does not regulate long-distance interstate natural-gas pipelines, and as to them, of course, there is a regulatory gap." *Id.* at 51.

[15] "A Resolution Relating to H.R. 5306, Eighty-First Congress," *Id.* at 76-78. *See also id.* at 44-45, 81-84.

[16] *Id.* at 23. The FPC also expressed concern over the "impracticability of effective security regulation" if exercised by all of the States traversed by a pipeline. *Id.* at 24.

[17] *Id.* at 23. *See also id.* at 24.

[18] *Id.* at 23.

nantly engaged in the *local distribution of electricity and natural gas.*" [19]

Thus neither the state representatives nor the FPC appeared to be of the belief that, as things stood, states could regulate the issuance of securities of wholesale interstate pipelines, and there is no indication in the legislative history that Congress concluded otherwise.

2. *Legislative History of The Natural Gas Act Reasonably Reflects a Conclusion That Natural Gas Company Securities Were Adequately Regulated Under Existing Federal Law and That More Restrictive Regulation Was Not Necessary or Desirable.*

Petitioner claims that congressional inaction on proposals such as H.R. 5306 "reinforce[s] the conclusion that Congress never intended to transfer securities jurisdiction over natural gas companies from the States to FERC." Pet. Br. at 27. As Petitioner concedes, however, this Court has cautioned against drawing any inferences from Congress' failure to act. *Id.* Petitioner has failed to cite to any actual expression of congressional intent that, merely because Congress did not go further in awarding more expansive authority to the federal agency, the states should thereby exercise such expansive authority over the securities of interstate natural gas companies. *See Transcontinental*, 106 S. Ct. at 717.

The 1950 hearings contain the testimony of a variety of witnesses describing the existing federal regulation of natural gas company securities, through the Security and Exchange Commission's ("SEC") regulation under the Public Utility Holding Company Act of 1935,[20] and the FPC's consideration of utility financings in connection

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[19] *Id.* at 83. *See also id.* at 23, 25.

[20] 15 U.S.C. §§ 79-79z-6 (1982 & Supp. III 1985).

with regulation under the NGA. Testimony indicated that, while existing federal regulation of natural gas company security issues did not rise to the level of preissuance approval of the securities of all such companies, the area was subject to substantial federal regulation.[21] Indeed, the Subcommittee's questioning of the witnesses indicated concern over whether augmenting the Commission's oversight of natural gas company security issuances, which would entail a delay in processing applications, "could have the effect of practically stopping such efforts. . . ." [22]

Thus, Congress' failure to enact the proposed legislation may have reflected in part a desire to allow the natural gas industry to continue development at an accelerated pace without the shackles of comprehensive FPC preissuance securities regulation, and a belief that the FPC's oversight of the industry through its existing authority under the NGA, coupled with securities regulation by the SEC, was sufficient.[23] In any event, however, there is no indication that Congress failed to go further because it intended that the states should exercise such

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[21] Report of the Federal Power Commission on a Bill (H.R. 5306, 81st Cong., 1st Sess.) To Amend Section 12 of the Natural Gas Act, As Amended, 1950 Hearing at 3-6. *See also id.* at 6-36, 38-39, 51-68.

[22] *Id.* at 123.

[23] Petitioners cite *Louisiana Public Service Comm'n v. FCC*, —— U.S. ——, 106 S. Ct. 1890 (1986), for the proposition that any attempt by FERC to preempt Act 144 would be void, inasmuch as FERC itself does not have the corresponding authority to approve securities. Pet. Br. at 25; *see also* NARUC Br. at 5. *Louisiana* stands only for the proposition that the federal agency may not preempt states from using a different method of depreciation for setting *intrastate* retail rates than that used by the federal agency in setting interstate rates. That case is inapposite to the question before this Court—whether Michigan may regulate the *interstate* (as distinct from intrastate) wholesale activity.

oversight, and there is no basis for reading such intent into Congress' silence on the matter.[24]

CONCLUSION

For the foregoing reasons, as well as those stated in Respondents' brief, the Court should affirm the decision of the Sixth Circuit below.

Respectfully submitted,

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July 1987

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[24] Hearings also were held in 1955 before the Senate Committee on Interstate and Foreign Commerce on several bills to amend the NGA, including S. 1880, which contained a provision essentially identical to H.R. 5306. The testimony heard by the Committee sheds little, if any, light on the reasons for Congress' failure to pass S. 1880. *Hearings on S. 712, S. 1248, S. 1853, S.1880, S. 1926, and S. 2001 Before the Senate Committee on Interstate and Foreign Commerce*, 84th Cong., 1st Sess. (1955).

APPENDIX A

Pipeline	Number of States Served
Algonquin Gas Transmission Co.	5
ANR Pipeline Co.	11
Arkla, Inc.	6
Colorado Interstate Gas Co.	8
Columbia Gas Trasmission Corp.	7
Columbia Gulf Transmission Co.	7
Consolidated Natural Gas Co.	5
East Tennessee Natural Gas Co.	2
El Paso Natural Gas Co.	6
Enserch Corp.	2
Florida Gas Transmission Co.	6
Great Lakes Gas Transmission Co.	3
High Island Off Shore System	2
KN Energy, Inc.	7
Michigan Consolidated Gas Co.	1
Michigan Gas Storage Co.	1
Midwestern Gas Transmission Co.	8
Mississippi River Transmission Corp.	6
Mountain Fuel Resources, Inc.	3
National Fuel Gas Co.	2
Natural Gas Pipeline Co. of America	14
Northern Border Pipeline Co.	5
Northern Natural Gas Co. (InterNorth)	17
Northwest Alaskan Pipeline Co.	2
Northwest Central Pipeline Corp.	7
Northwest Pipeline Corp.	9
Overthrust Pipeline Co.	1
Pacific Gas Transmission Co.	4
Panhandle Eastern Pipe Line Co.	6
Sea Robin Pipeline Co.	1
SONAT, Inc. (Trunkline)	6
Stingray Pipeline Co.	2
Standard Pacific Gas Line, Inc.	1
Tennessee Gas Transmission Co.	18
Texas Eastern Corporation	16
Texas Gas Transmission Corp.	12

Trailblazer Pipeline System	3
Transco Gas Supply Co.	1
Transco Gas Co.	18
Transwestern Pipeline Co.	4
Trunkline Gas Co.	8
United-Transco Offshore System	1
United Gas Pipe Line Co.	5
Williston Basin Interstate Pipeline	4
Wyoming Interstate Co., Ltd.	2

Total Number of Pipelines: 45

AVERAGE:	6
Maximum:	18
Minimum:	1

Source: Statistics of Interstate Natural Gas Pipeline Companies 1985, Energy 1985, Energy Information Administration

APPENDIX A

State Index

Company	State in Which Company Furnishes Services *
Algonquin Gas Tranmission Co.	CT, MA, NJ, NY, RI
ANR Pipeline Co.	IL, IN, IA, KS, LA, MI, MO, OH, TN, WI, WY
Arkla, Inc.	AR, KS, LA, MO, OK, TX
Colorado Interstate Gas Co.	CO, KS, MT, NM, OK, TX, UT, WY
Columbia Gas Transmission Corp.	KY, MD, NY, OH, PA, VA, WV
Columbia Gulf Transmission Co.	AR, KY, LA, MS, TN, TX, WY
Consolidated Natural Gas Co.	LA, NY, OH, PA, WV
East Tennessee Natural Gas Co.	TN, VA
El Paso Natural Gas Co.	AZ, CO, NM, OK, TX, UT
Enserch Corp.	OK, TX
Florida Gas Transmission Co.	AL, FL, OK, LA, MS, TX
Great Lakes Gas Transmission Co.	MI, MN, WI
High Island Offshore System	LA, TX
KN Energy, Inc.	CO, KS, MT, NE, OK, TX, WY
Michigan Consolidated Gas Co.	MI
Michigan Gas Storage Co.	MI
Midwestern Gas Transmission Co.	IL, IN, KY, MN, NY, ND, TN, WI
Mississippi River Transmission Corp.	AR, IL, LA, MS, OK, TX
Mountain Fuel Resources, Inc.	CO, UT, WY
National Fuel Gas Co.	NY, PA
Natural Gas Pipeline Co. of America	AR, CO, IL, IA, KS, LA, MO, NE, NM, ND, OK, TX, UT, WY
Northern Border Pipeline Co.	MT, ND, SD, MN, IA
Northern Natural Gas Co. (InterNorth)	CO, IL, IA, KS, LA, MI, MN, MO, MT, NE, NM, ND, OK, SD, TX, WI, WY

* Granite State Gas Transmission, Inc., which is a member of INGAA and which serves the State of Maine, is not reflected in this Table.

Company	State in Which Company Furnishes Services
Northwest Alaskan Pipeline Co.	ID, MT
Northwest Central Pipeline Corp.	CO, KS, MO, NE, OK, TX, WY
Northwest Pipeline Corp.	CO, ID, LA, NM, OK, OR, UT, WA, WY
Overthrust Pipeline Co.	WY
Pacific Gas Transmission Co.	CA, ID, OR, WA
Panhandle Eastern Pipe Line Co.	IL, IN, KS, MI, MO, OH
Sea Robin Pipeline Co.	LA
SONAT, Inc.	AL, GA, LA, MS, SC, TN
Stingray Pipeline Co.	LA, TX
Standard Pacific Gas Line Inc.	CA
Tennessee Gas Transmission Co.	AL, AR, CT, KY, LA, MA, MS, NH, NJ, NY, OH, OK, PA, RI, TN, TX, WV, WY
Texas Eastern Corp.	AL, AR, IL, IN, KY, LA, MD, MS, MO, NJ, NY, OH, PA, TN, TX, WV
Texas Gas Transmission Corp.	AR, CO, IL, IN, KY, LA, MS, OH, OK, PA, TN, TX
Trailblazer Pipeline System	CO, NE, WY
Transco Gas Supply Co.	TX
Transcontinental Gas Pipeline Corp.	AL, DE, GA, LA, MD, NM, MS, NC, ND, OH, NJ, OK, PA, SC, TX, VA, WI
Transwestern Pipeline Co.	AZ, NM, OK, TX
Trunkline Gas Co.	AR, IL, IN, KY, LA, MS, TN, TX
United-Transco Offshore System	LA
United Gas Pipe Line Co.	AL, FL, LA, MS, TX
Williston Basin Interstate Pipeline	MT, ND, SD, WY
Wyoming Interstate Co., Ltd.	CO, WY

NOTE: In 1984, the reporting criteria for Form FERC-2 was changed to include only major pipeline companies.